TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 184

THE STANDARD OIL COMPANY, AN OHIO CORPORATION, APPELLANT,

vs.

JOHN W. PECK, TAX COMMISSIONER, STATE OF OHIO, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED JULY 9, 1951.

PROBABLE JURISDICTION NOTED OCTOBER 8, 1951.

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INDEX

	Original	Print
Proceedings in Supreme Court of Ohio	1	1
Petition for appeal	1	1
Order allowing appeal	3	2
Assignment of errors and prayer for reversal	5	3
Proofs of service of appeal papers	94	4
Notices to appellees, required by Rule 12	97	5
Praecipe for transcript of record	101	7
Docket and journal entries	114	9
Judgment	118	11
Order of substitution	118	12
Notice of appeal	120	13
Decision of Board of Tax Appeals	122	13
Concurring memorandum	163	39
Proceedings before the Board of Tax Appeals	198	45
Notice of appeal, (Personal property tax assessment for 1945)	198	45
Exhibit "A"—Order of the Tax Commissioner	202	47
Amendment and supplement to notice of appeal	207	51

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., Nov. 9, 1951.

—8270

	Original	Print
Proceedings before the Board of Tax Appeals—Continued		
Notice of appeal (Personal property tax assessment for 1946)	208	52
Exhibit "A"—Order of the Tax Commissioner	211	54
Amendment and supplement to notice of appeal	217	58
Proceedings and testimony	226	59
Appearances	226	59
Agreement re Consolidation of cases	228	60
Excerpts from opening statement by Mr. Day	228	60
Testimony of Henry William Pattison	241	65
Testimony of William N. Kall	270	89
Proceedings before the Tax Commissioner	575	93
Findings of the Tax Commissioner, No. 3327	575	93
Findings of the Tax Commissioner, No. 3276	644	97
Appellant's exhibit "1" before Board of Tax Appeals—Map showing The Standard Oil Co. (Ohio) and subsidiary companies. Transportation Operations	650	102
Appellant's exhibit "2" before Board of Tax Appeals. Chart showing Statement of Sohio Petroleum Company—Crude Oil River operations—Owned boats only 1944-1945-1946	651	102
Opinion, Matthias, J.	738	103
Concurring opinion, Taft, J.	760	122
Certificate as to the Court's intent to hold Sections 5328 and 5325 General Code of Ohio to be valid and not repugnant to the Fourteenth Amendment of the Constitution of the United States	761	123
Application for substitution of appellees	766	124
Notice of application	767	125
Clerk's certificate (omitted in printing)	769	
Statement of points to be relied upon and designation of parts of record to be printed	771	125
Order noting probable jurisdiction	774	128

[fol. 1] **IN THE SUPREME COURT OF OHIO**

No. 32,060

THE STANDARD OIL COMPANY, an Ohio Corporation,
Appellant,

vs.

JOHN W. PECK, Tax Commissioner of Ohio (Substituted for C. Emory Glander, Former Tax Commissioner of Ohio), and John J. Carney, Auditor of Cuyahoga County (Substituted for John A. Zangerle, Former Auditor of Cuyahoga County), Appellees

PETITION FOR APPEAL FROM THE SUPREME COURT OF OHIO—
Filed June 7, 1951

To the Honorable Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio:

Now comes The Standard Oil Company, the above named appellant, by McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett, of Cleveland, Ohio, its attorneys, and alleges that it is a corporation duly organized and existing under the laws of the State of Ohio, having its principal office and place of business in the City of Cleveland, Ohio; that in the above entitled cause, the Supreme Court of the State of Ohio rendered an opinion, decision and final judgment on the 14th day of March, 1951.

Appellant has with this petition filed with the Clerk of said Supreme Court an assignment of errors setting forth [fol. 2] separately and particularly each error of the Supreme Court in said cause complained of by appellant, and also a separate statement particularly disclosing the basis upon which appellant contends that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

Wherefore, your petitioner prays the allowance of an appeal from said judgment of the Supreme Court of the State of Ohio to the Supreme Court of the United States, to the end that the record in said matter may be removed into the said Supreme Court of the United States and the errors

complained of by your petitioner may be examined and corrected and said judgment reversed and a judgment rendered in favor of the appellant on the issues as to which error has been assigned, and for costs.

The Standard Oil Company, by McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett, Its Attorneys.

Isador Grossman, Rufus S. Day, Jr., H. V. E. Mitchell, of Counsel.

[File endorsement omitted.]

[fol. 3] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 7, 1951

The appellant in the above entitled cause having prayed for the allowance of an appeal to the Supreme Court of the United States from the final judgment rendered therein by the Supreme Court of Ohio on the 14th day of March, 1951, and having presented and filed with this Court its Petition for Appeal, Assignment of Errors and Prayer for Reversal, and Statement of Jurisdiction, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided:

It is hereby ordered that the said appeal be and the same is hereby allowed as prayed for, and that the Clerk of the Supreme Court of Ohio shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Clerk of the Supreme Court of [fol. 4] the United States so that he shall have the same in said Court within forty days from the date hereof.

It is further ordered that security for costs on appeal be fixed at the sum of $500.00, and that upon approval of bond in said amount this order shall operate as a supersedeas.

Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio. 6/7/51.

Dated at Columbus, Ohio this 7th day of June, 1951.

[fol. 5] IN THE SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed June 7, 1951

The Standard Oil Company, appellant herein, alleges that the Supreme Court of Ohio, in connection with this cause, erred in the following respects:

1. In holding that Ohio, the domiciliary state of appellant, on the facts disclosed by the record, had jurisdiction to tax appellant's boats and barges, at their full value and without apportionment, for Ohio Personal Property Tax purposes for the years 1945 and 1946, although these boats and barges were used solely and regularly in navigating the Mississippi and Ohio Rivers from points in Louisiana or Tennessee to points in Indiana or Kentucky, and only 1.27% of such navigation was in waters which bordered on Ohio;

[fols. 6-93] 2. In failing to hold that Sections 5328 and 5325 of the General Code of Ohio, which it construed to require the taxation of appellant's boats and barges, at their full value and without apportionment, for Ohio Personal Property Tax purposes for 1945 and 1946, were violative of and repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States; and

3. In affirming the judgment of the Ohio Board of Tax Appeals sustaining the assessments made by the Tax Commissioner of Ohio of appellant's boats and barges for Ohio Personal Property Tax purposes for 1945 and 1946, and in not reversing and setting aside such assessments on the ground that the assessments and the statutes authorizing them were violative of and repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Wherefore, The Standard Oil Company, appellant herein, prays that the said judgment of the Supreme Court of the State of Ohio, which judgment was rendered and became final March 14, 1951, be reversed insofar as it re-

lates to the taxation of appellant's boats and barges, and that judgment be rendered in favor of the appellant herein on said issue and for costs.

The Standard Oil Company, by McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett, Its Attorneys.

Isador Grossman, Rufus S. Day, Jr., H. V. E. Mitchell, of Counsel.

[File endorsement omitted.]

[fols. 94-95] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

PROOF OF SERVICE—Filed June 7, 1951

Service upon the undersigned is hereby acknowledged of the following documents filed in the above entitled cause, to-wit:

(1) Petition for appeal from the Supreme Court of Ohio;
(2) Assignment of errors;
(3) Statement in support of jurisdiction;
(4) Order allowing appeal;
(5) Certificate as to federal question involved;
(6) Citations to appellees;
(7) Notice to appellees pursuant to Rule 12(3) of the Rules of the Supreme Court of the United States;
(8) Precipe for transcript of record.

Witness, the undersigned this 7th day of June, 1951.

John W. Peck, Tax Commissioner of Ohio, by C. William O'Neill, Attorney General, State of Ohio, Robert E. Leach, Assistant Attorney General, State of Ohio.

[fol. 96] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

PROOF OF SERVICE—Filed June 12, 1951

Service upon the undersigned is hereby acknowledged of the following documents filed in the above entitled cause, to-wit:

(1) Petition for appeal from the Supreme Court of Ohio;
(2) Assignment of errors;
(3) Statement in support of jurisdiction;
(4) Order allowing appeal;
(5) Certificate as to federal question involved;
(6) Citations to appellees;
(7) Notice to appellees pursuant to Rule 12(3) of the Rules of the Supreme Court of the United States;
(8) Praecipe for transcript of record.

Witness, the undersigned this 11th day of June, 1951.
John J. Carney, Auditor of Cuyahoga County, Ohio,
by L. B. Mitchell, Chief Deputy.

[fol. 97] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

NOTICE TO APPELLEE—Filed June 12, 1951

Notice is hereby given to John J. Carney, Auditor of Cuyahoga County, appellee in the above styled cause, that an appeal was allowed in said cause by the Honorable Carl V. Weygandt, Chief Justice, Supreme Court of Ohio, on June 7, 1951, and the attention of the appellee is hereby called to paragraph 3 of Rule 12 of the Supreme Court of the United States, which is as follows:

"Within 15 days after such service the appellee may file with the clerk of the court possessed of the record,

and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant. There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm. Where such a motion is made, it may be opposed as provided in Rule 7, paragraph 3."

McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett.

Service of the foregoing notice is hereby acknowledged this 11th day of June, 1951.

John J. Carney, Co. Auditor, by L. B. Mitchell, Deputy.

[fols: 98-100] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

NOTICE TO APPELLEE—Filed June 7, 1951

Notice is hereby given to John W. Peck, Tax Commissioner, State of Ohio, appellee in the above styled cause, that an appeal was allowed in said cause by the Honorable Carl V. Weygandt, Chief Justice, Supreme Court of Ohio, on June 7, 1951, and the attention of the appellee is hereby called to paragraph 3 of Rule 12 of the Supreme Court of the United States, which is as follows:

"Within 15 days after such service the appellee may file with the clerk of the court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant. There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm. Where such a motion is made, it may be opposed as provided in Rule 7, paragraph 3."

McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett.

Service of the foregoing notice is hereby acknowledged this 7th day of June, 1951.

C. William O'Neil, Attorney General; Robert E. Leach, Asst. Attorney General, Attorneys for John W. Peck, Tax Commissioner of Ohio.

[fol. 101] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

PRECIPE FOR TRANSCRIPT OF RECORD—Filed Jun 12, 1951

To the Clerk of the Supreme Court of Ohio:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States pursuant to an appeal in the above styled cause, and to include in this transcript of record the following papers and documents, to-wit:

1. Transcript of docket and journal entries in this cause in its entirety;

2. Printed record in this cause in its entirety (2 vols.);

3. Opinion of the Tax Commission of the State of Ohio for the years 1945 and 1946 in this case;

4. Opinion and entry of the Board of Tax Appeals in this cause filed November 19, 1949 and opinion and entry of December 15, 1949 upon appellant's application for rehearing;

[fol. 102] 5. Notice of Appeal to the Supreme Court of Ohio from the Board of Tax Appeals' decision in this cause filed by appellant herein;

6. Assignment of errors filed by appellant in the Supreme Court of Ohio from decision and order of the Board of Tax Appeals in this cause;

7. Opinion and decision of the Supreme Court of Ohio rendered in this cause on March 14, 1951;

8. Petition for appeal to the Supreme Court of the United States filed by appellant herein;

9. Statement in support of jurisdiction of the Supreme Court of the United States;

10. Order of the Chief Justice of the Ohio Supreme Court allowing appeal to the Supreme Court of the United States;

11. Assignment of errors with respect to the decision and judgment of the Supreme Court of Ohio in this cause, filed by appellant herein;

12. Citation on appeal to John W. Peck, Tax Commissioner of the State of Ohio, signed by the Chief Justice of the Supreme Court of Ohio; Citation on appeal to John J. Carney, Auditor of Cuyahoga County, Ohio, signed by the Chief Justice of the Supreme Court of Ohio;

13. Certificate as to federal question involved signed by the Chief Justice of the Supreme Court of Ohio;

14. Notice of appeal pursuant to Rule 12(3) of Rules of The United States Supreme Court, addressed to John W. Peck, Tax Commissioner of the State of Ohio, and John J. Carney, Auditor of Cuyahoga County;

[fols. 103-105] 15. The bond for costs of appeal and approval thereof;

16. This precipe with acknowledgment and waiver of counter precipe;

17. Proof of service of appeal papers.

Said transcript to be prepared as required by law and the rules of this court and the rules of the Supreme Court of the United States, and to be filed in the office of the Clerk of the Supreme Court of the United States on or before the 17th day of July, 1951.

McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett, Attorneys for Appellant.

[fols. 106-113] Service of the foregoing precipe upon the undersigned is hereby acknowledged and right of filing counter precipe is hereby waived, this 7th day of June, 1951.

C. William O'Neill, Attorney General; Robert E. Leach, Ass't Attorney General, Attorneys for John W. Peck, Tax Commissioner of Ohio.

[fol. 114] THE SUPREME COURT OF OHIO

DOCKET AND JOURNAL ENTRIES

Dec. 19, 1949. Notice of Appeal and proof of service filed.

Jan. 17, 1950. Transcript of record, abstract of docket of Board of Tax Appeals (7 Vols. in all) filed.

Jan. 17, 1950. Papers sent to Gates. 5/4/50 returned.

Feb. 13, 1950. Application for extension of time to file printed record and appellant's brief filed.

Feb. 13, 1950. Entry extending time for filing printed record and Appellant's brief to April 1, 1950. William L. Hart, J., J. 39-351.

Feb. 17, 1950. Supplemental transcript of record filed. 5/4/50 returned.

Mar. 22, 1950. Application for extension of time to file printed record and appellant's brief and consent to granting of same filed.

[fol. 115] Mar. 22, 1950. Entry extending time for filing printed record and appellant's printed brief to May 15, 1950. Carl V. Weygandt, C. J., J. 39-385.

May 3, 1950. Printed record Vol. 1 and 2 and proof of service filed.

May 5, 1950. Application for an extension of time to file Appellant's brief, etc., filed.

May 5, 1950. Entry extending time for filing appellant's brief to June 15, 1950, Appellee's brief to September 1, 1950 and Appellant's reply brief to September 30, 1950. Carl V. Weygandt, C. J., J. 39-433.

June 12, 1950. Entry extending time for filing Appellant's printed brief to June 20, 1950. Carl V. Weygandt, C. J., J. 39-464.

June 24, 1950. Leave granted Appellant to file brief instanter.

June 24, 1950. Appellant's printed brief and affidavit of service filed.

Sep. 1, 1950. Appellee's printed brief and affidavit of service filed. 9/6/50 proof of service filed.

Oct. 6, 1950. Entry extending time for filing Appellant's reply brief to Oct. 13, 1950. Carl V. Weygandt, C. J., J. 39-539.

Oct. 13, 1950. Appellant's printed reply brief and affidavit of service filed.

Mar. 14, 1951. Decision affirmed in part and reversed in part. J. 39-670.

Mar. 21, 1951. Mandate Issued.

May 22, 1951. Certificate of Supreme Court of Ohio as to Federal Constitutional question filed.

June 7, 1951. Application for substitution of appellees and proof of service filed.

June 7, 1951. Entry granting application for substitution of appellees approved. Carl V. Weygandt, C. J., J. 40-47.

June 7, 1951. Petition for appeal filed.

[fol. 116] June 7, 1951. Order allowing appeal filed.

June 7, 1951. Assignment of errors and prayer for reversal filed.

June 7, 1951. Statement in support of jurisdiction filed.

June 7, 1951. Bond in sum of $500.00 American Casualty Co. as surety approved and filed.

June 7, 1951. Notice to appellee, John W. Peck, Tax Commr. and proof of service filed.

June 7, 1951. Citation issued to John J. Carney, Auditor.

June 7, 1951. Citation to John W. Peck, Tax Commr. filed.

June 7, 1951. Proof of service of all papers on John W. Peck, Tax Commr. filed.

June 7, 1951. Precipe for transcript of record filed.

June 12, 1951. Citation returned and filed.

June 12, 1951. Notice to appellee, John J. Carney, Auditor and proof of service filed.

June 12, 1951. Proof of service of all papers on John J. Carney, Auditor filed.

June 19, 1951. Statement in opposition to appellant's statement in support of jurisdiction and appellee's motion to dismiss or affirm filed. 6/21/51 Proof of service filed.

[fol. 117] JOURNAL ENTRIES

Entry.

Monday, February 13, 1950.

Upon application of appellant, and for good cause shown, it is ordered that the time for filing printed record and appellant's brief herein be, and the same hereby is extended to April 1, 1950. William L. Hart, Judge. J. 39-351.

Entry.

Wednesday, March 22, 1950.

Upon application of appellant, and for good cause shown, it is ordered that the time for filing printed record and appellant's printed brief herein be, and the same hereby is extended to May 15, 1950. Carl V. Weygandt, C. J. J. 39-385.

Entry.

Friday, May 5, 1950.

Upon application of counsel for both sides and for good cause shown, it is ordered that the time for filing appellant's brief herein be, and the same hereby is, extended to June 15, 1950, appellees' brief to September 1, 1950 and appellant's reply brief to September 30, 1950. Carl V. Weygandt, Chief Justice. J. 39-433.

Entry.

Monday, June 12, 1950.

Upon application of appellant, and for good cause shown, it is ordered that the time for filing appellant's printed brief herein be, and the same hereby is extended to June 20, 1950. Carl V. Weygandt, Chief Justice. J. 39-464.

[fol. 118] Entry.

Friday, October 6, 1950.

Upon application of appellant, and for good cause shown, it is ordered that the time for filing appellant's printed reply brief herein be, and the same hereby is, extended to October 13, 1950. Carl V. Weygandt, Chief Justice. J. 39-539.

APPEAL FROM THE BOARD OF TAX APPEALS

JUDGMENT

Wednesday, March 14, 1951.

This cause came on to be heard upon the transcript of the Record of the Board of Tax Appeals of Ohio and was argued by counsel. On consideration whereof, it is ordered

and adjudged by this court, that the decision of the said Board of Tax Appeals be and the same hereby is reversed insofar as its decision did not make proper allowance for obsolescence in the year 1946 and its refusal to grant the taxpayer proper reduction to book value for the year 1945.

It Is Further Ordered that the cause be, and the same hereby is, remanded to the Board of Tax Appeals for further proceedings in accordance with the opinion rendered herein.

Ordered, That a special mandate be sent to the Board of Tax Appeals of Ohio to carry this Judgment into Execution. J. 39-670.

ORDER FOR SUBSTITUTION OF APPELLEES

Thursday, June 7, 1951.

The Standard Oil Company, appellant in the above entitled cause, having filed with this court an application for substitution of appellees, and it appearing to the court that John W. Peck, is at present the holder of the Office of Tax Commissioner of the State of Ohio and that he is the successor in office to C. Emory Glander, former Tax Commissioner of the State of Ohio, appellee in the above entitled cause, and it appearing to the Court that John J. [fol. 119] Carney is at present the holder of the office of Auditor of Cuyahoga County, Ohio, and that he is the successor in office to John A. Zangerle, former Auditor of Cuyahoga County, appellee in the above entitled cause, and it further appearing to this court that the substitution of the present holders of the office of Tax Commissioner of the State of Ohio and the office of Auditor of Cuyahoga County, Ohio is desirable and proper, it is therefore, Ordered, Adjudged and Decreed that John W. Peck, Tax Commissioner of Ohio, be substituted as appellee in the above entitled cause for C. Emory Glander, former Tax Commissioner of Ohio, and that John J. Carney, Auditor of Cuyahoga County, Ohio, be substituted as appellee in the above entitled cause for John A. Zangerle, former Auditor of Cuyahoga County, Ohio. Carl V. Weygandt, Chief Justice. J. 40-47.

[fol. 120] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

NOTICE OF APPEAL—Filed December 19, 1949

[fol. 121] The Standard Oil Company, Appellant herein, hereby gives notice of appeal to the Supreme Court of Ohio from a decision rendered by the Board of Tax Appeals, Department of Taxation of Ohio, on November 19, 1949, in consolidated cases Nos. 12488, 14381 and 14514 before it, said consolidated cases, and each of them, being entitled "The Standard Oil Company, an Ohio Corporation, Appellant, vs. C. Emory Glander, Tax Commissioner of Ohio, Appellee". A copy of said decision is set forth on the next succeeding pages of this notice of appeal.

[fol. 122] DECISION OF BOARD OF TAX APPEALS IN CONSOLIDATED CASES NOS. 12488, 14381 and 14514

These several causes and matters came on to be heard and considered by the Board of Tax Appeals on appeals heretofore filed by the appellant above named, an Ohio corporation, from final orders and tax assessments made by the tax commissioner on and with respect to certain tangible personal property of the appellant for the tax years 1943, 1944, 1945 and 1946, respectively. Case No. 12488 is an appeal filed herein from a final assessment certificate and amendment thereof assessing for the tax years 1943 and 1944, respectively, a Houdry catalytic cracking unit which was in process of construction on January 1, 1943, and on January 1, 1944, but which was unfinished and not yet in operation on each of said tax listing dates. Case No. 14381 is before the Board on two appeals, as amended, from final orders of the tax commissioner here in question for the tax years 1945 and 1946, respectively, [fol 123] on certain towboats and barges of the appellant company, on the then finished and operating Houdry catalytic cracking unit, above referred to, and on certain machinery and equipment in process of construction which

was unfinished and not in operation on January 1, the tax listing day in each of said tax years. Case No. 14514 is an appeal from a final assessment certificate of the tax commissioner for the tax year 1945, which tax certificate was made and issued after the appeal for said tax year in case No. 14381 was filed herein; and aside from the question of the authority of the tax commissioner to make such final assessment, the issues presented in this appeal are the same as those noted in the appeal in case No. 14381, so far as the tax assessments in question for the year 1945 are concerned. These cases were heard and submitted to the Board on said several and respective appeals, on transcripts of the proceedings of the tax commissioner relating to the several tax assessments complained of, on evidence offered and introduced by the parties on a consolidated hearing of the cases before an examiner of the Board and on the briefs of counsel.

The first question presented to the Board on the hearing and submission of these cases is that presented in the appeals as amended for the tax years 1945 and 1946 in case No. 14381, with respect to the taxability of certain towboats and barges which were owned by the company on tax list- [fol. 124] ing day in said tax years, and which were used by it in the transportation of petroleum and petroleum products on the Mississippi and Ohio Rivers during the years 1944 and 1945. As to this it appears that the company listed these towboats and barges in the personal property tax returns which it made as an inter-county corporation for the tax years 1945 and 1946, respectively, and that the tax commissioner assessed these boats and barges on the basis of a true value of the same in the amount of $1,322,863 for the tax year 1945 and on the basis of the true value of $1,303,907 for the tax year 1946—the assessment in each case being on a list or assessed valuation of 70% of the determined true valuation. Of the boats and barges returned for taxation by the company in said tax years certain boats and barges having a true valuation of $109,541 for the tax year 1945, and $102,022 for the tax year 1946, were used by the company in transporting gasoline from the company's refinery at Latonia, Kentucky, to various Ohio River points in this state. No question is made in this case by the appellant with respect to the boats and

barges so used. The other boats and barges of the company, the taxability of which is a question at issue in this case, were used by the company for the transportation of crude oil from Gibson Landing in the state of Louisiana and from other points on the Mississippi River, up that [fol. 125] river and up the Ohio River to Mt. Vernon, Indiana, where the company had a pipe line terminal, and to Bromley, Kentucky, from which point crude oil was delivered for use at the company's refinery at Latonia, Kentucky.

These boats and barges in transporting crude oil to the company's pipe line terminal at Mt. Vernon, Indiana, did not, of course, reach that part of the waters of the Ohio River which border on the State of Ohio; while these same boats and barges in transporting crude oil to Bromley, Kentucky, a point across the river from Cincinnati, Ohio, traverse the waters bordering on this state for a distance of only 17½ miles—the distance from the Ohio-Indiana line to Bromley. And, apparently, no part of the movement of these boats and barges is in waters within the territory of the State of Ohio—which territory extends only to low water mark on the Ohio side of the river—, unless it be on relatively infrequent occasions when empty boats nose into the dock at Cincinnati for minor repairs or for the purpose of taking on food supplies.

In this situation the appellant contends that these boats and barges were not taxable under the provisions of section 5328 and other related sections of the General Code, for the tax years here in question, for the stated reasons (1) that the navigation of the waters of the Ohio River bordering [fol. 126] on this state were so inconsequential that these boats and barges did not have the character of "personal property within the purview of section 5325, General Code," and (2) that consistently with the requirement of due process in the taxation of property of this kind the state was not authorized to make the tax assessments here in question. In this connection it may be observed that inasmuch as it appears that the taxes assessed on these boats and barges for the tax years 1945 and 1946 have been paid (Rec. p. 16), it may well be doubted whether anything more than a moot question is here presented with respect

to the taxability of this property for said tax years. See The Central Iron and Metal Co. v. Evatt, 27 O. O., 1.

Passing this point, however, and addressing ourselves to the merits of the question presented on this assignment of error, it is noted that section 5328, General Code, provides, among other things, that:

> "All ships, vessels, and boats, and shares and interests therein, defined in this title as 'personal property,' belonging to persons residing in this state, and aircraft belonging to persons residing in this state, and not used in business wholly in another state, shall be subject to taxation."

Section 5325, General Code, defining the term "personal property" for purposes of taxation includes in this term "every share or portion, right, or interest, either legal or equitable, in and to every ship, vessel, or boat, of whatsoever name or description, used or designed to be used either [fol. 127] exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere, and whether it has been enrolled, registered, or licensed, at a collector's office, or within a collection district in this state, or not."

Section 5366, General Code, characterizes as "taxable property" all the kinds of property mentioned or referred to in the above quoted provisions of section 5328, General Code. Section 5371, General Code, provides generally that personal property used in business shall be listed and assessed in the taxing district in which such business is carried on. This section, however, further provides as follows:

> "Ships, vessels, boats and aircraft, and shares and interests therein shall be listed and assessed in the taxing district in which the owner resides."

Inasmuch as it appears that at all of the times here in question these boats and barges were used in part in navigating the waters of the Ohio River bordering on this state, such boats and barges as the property of the appellant, an Ohio corporation having its domicile in this state, were

clearly taxable under the expressed terms of the above noted statutory provisions. In this connection it is pertinent to note, further, that by section 5388, General Code, it is provided, with certain exceptions not here important, [fol. 128] that personal property shall be listed and assessed at seventy per centum of the true value thereof, in money, on the day as of which it is required to be listed.

As to the constitutional question presented by appellant in its assignment of error with respect to the taxation of these boats and barges for said tax years, it may be observed that the above noted statutory provisions relating to the taxation in this state of property of this kind, were enacted in apparent recognition of the then established rule that consistently with the requirement of due process of law in the taxation of property of this kind, ships, vessels and boats which are designed for and are used in navigating the high seas, the Great Lakes or the inland waters of this country were taxable only at the domicile of the owner or owners of such property, unless such ships, vessels or boats have acquired an actual situs in another state by being engaged in navigation wholly within the limits of such other state. Pioneer Steamship Company v. Evatt, 18 O. O., 510, 514, and cases therein cited; Ott v. Mississippi Valley Barge Line Company (U. S. Supreme Court case No. 244), decided February 7, 1949; 93 L. Ed.—Advance Opinions—431, 434. This rule that in a situation such as that here presented, property of this kind can be taxed only at the domicile of the owner, has been limited by the decision of the United States [fol. 129] Supreme Court in the case of Ott v. Mississippi Valley Barge Line Company, supra, wherein it was held that a state other than that which is the domicile of the owner of boats and barges navigating the waters of the Mississippi and Ohio Rivers, may levy a tax extended on the proportionate value of such boats and barges represented by the total number of miles of the lines of navigation by such boats and barges in the taxing state as compared to the total number of miles of the entire line of navigation in said rivers. As to this it may be observed, however, that it does not appear in the facts of the above cited case that the boats and barges there in question had been taxed in the state where the owner thereof was incorporated and had its

domicile. Moreover, neither in the Ott case nor in any other case which has come to our attention has it been expressly held that the domiciliary state has not the power and authority to levy a tax on property of this kind extended on the value of such property or upon some stated statutory percentage thereof. If it be thought that the decision of the Supreme Court of the United States in the Ott case in some of its implications has the effect of limiting the above noted statutory provisions of this state providing for the taxation of the boats and barges here in question so as to render unconstitutional the taxes here in question on this assignment of error, it may be observed that the Board of Tax [fol. 130] Appeals as an administrative and quasi judicial tribunal will not assume jurisdiction and authority to consider and determine such constitutional question. National Distillers Products Corp. v. Glander, 49 Abs., 330, 337. See Hillsborough Township v. Cromwell, 326 U. S., 620, 625, 90 L. Ed., 358, 364; Schwartz v. Essex County Board of Taxation, 120 N. J. L., 129, 132, affirmed 130 N. J. L., 177. In the case last above cited it was said:

> "It is undisputable that the determination of the constitutionality of an act of the legislature rests with a judicial body; not with a quasi judicial body such as the State Board of Tax Appeals. The final responsibility to pass upon the constitutionality of a given piece of legislation rests in the courts and it is the duty of the various state agencies and administrative bodies to accept a legislative act as constitutional until such time as it has been declared to be unconstitutional by a qualified judicial body."

In this situation and in view of the fact that no question is here made as to either the true or list values of the boats and barges of the appellant for said tax years, the tax assessments here in question are affirmed except as to the assessments on the M. V. Mt. Vernon, a small towboat having a value of about $3500, and which during the years 1944 and 1945 did not navigate any of the waters of the Ohio River bordering on this state; as to the assessments on this boat the order of the tax commissioner is reversed.

A further question submitted to the Board on the presentation of this case is that as to the taxability of certain

[fol. 131] machinery and equipment of various kinds which were in process of construction on January 1 in the tax years 1943, 1944, 1945 and 1946, respectively, but which as to the particular machinery and equipment here in question were unfinished and not in operation on said several tax assessment dates. This question with respect to the tax years 1943 and 1944 is presented on an assignment of error in the appeal filed herein as case No. 12488, and relates to an unfinished Houdry catalytic cracking unit at the company's refinery at Cleveland, the construction of which commenced in August 1942 but the construction of which was not completed until about July 1, 1944. By January 1, 1945, the Houdry catalytic cracking plant had been completed and put in operation. However, on that date the company had in process of construction in various counties of the state certain other items of machinery and equipment which were unfinished and not in operation on said date. Likewise on January 1, 1946, there were in process of construction in several different counties of the state certain items and units of machinery and equipment which were unfinished on said tax assessment date. The principal part of the property referred to in this connection was an unfinished thermal gas plant at the company's Cleveland refinery.

The appellant company in filing its combined tax returns as an inter-county corporation for the tax years above [fol. 132] referred to, did not as to any of such tax years list any item or unit of machinery and equipment which was in process of construction and unfinished upon tax assessment day in such year. As to this the appellant company admitted that the materials which were incorporated in these unfinished items or units became the property of the company upon delivery of the same to the several grounds upon which this machinery and equipment was being constructed. And it is further conceded by the appellant that these unfinished structures, representing the labor and material which had gone into the same, had the character of personal property—so far as the question here under consideration is concerned. And there is no dispute about the fact that these several structures were constructed for the purpose and in connection with the business of the appellant which it was conducting at these several locations.

As to this, the contention of the appellant is that these unfinished items or units of machinery and equipment were not "used," within the purview of section 5328 and related sections of the General Code which generally and with respect to property of this kind, limit the taxation of tangible personal property to that which is "located" and "used in business in this state." In this connection it is noted that section 5325-1, General Code, defining the term "used in business" as well as the term "business," itself, [fol. 133] provides:

> "Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; . . . 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Further as to this it appears that the refinery of the appellant at its Cleveland location and likewise, presumably, those at other locations as well, consist of a number of units each of which has more or less independent functions in the manufacture of petroleum products of different kinds. Each of such units is customarily referred to in the industry as a "plant." In this view the appellant contends that an unfinished item of machinery and equipment is obviously not "a part of a plant capable of operation" within the purview of section 5325-1, General Code, and that such unfinished item was not, therefore, "used in business" under section 5328 and other sections of the General Code providing for the taxation of tangible personal property. It is to be observed however that the above noted provisions of section 5325-1, General Code, were not enacted with special reference to either appellant's refineries at Cleveland or elsewhere or to petroleum refineries generally in this state. And in this view recognition must be given to

the general definition that in an industrial or commercial [fol. 134] sense, a "plant" includes real estate and all else that represents capital invested in the means of carrying on a business, exclusive of raw material or the manufactured product. This leads to the conclusion that as to the refinery property of the appellant each refinery as a whole at its location in Cleveland or elsewhere is "a plant" within the meaning of section 5325-1, General Code. Inasmuch as each unfinished item or machinery and equipment here in question was a part of a refinery or "plant" capable of operation and in actual operation and was kept and maintained as such, it was property "used" and "used in business" within the meaning of the taxing statutes here under consideration.

By appropriate assignments of error in the appeals above referred to the appellant has presented to this Board questions relating to the taxable values of this unfinished machinery and equipment for the several tax years above noted. It is thought to be appropriate, however, to defer the consideration of these questions until we have considered the questions herein presented with respect to the taxable valuation of the Houdry catalytic cracking plant as a completed and operating unit for the tax years 1945 and 1946, respectively.

As above noted herein case No. 14381 on the docket of the Board includes appeals filed herein by the appellant, [fol. 135] above noted, from final orders of the tax commissioner which modified and, as modified, confirmed an increased personal property tax assessment against the appellant for each of the tax years 1945 and 1946. One of the personal property tax units involved in this case, both as to the tax years 1945 and 1946, was the Houdry catalytic cracking plant, so called, which was constructed primarily as a war facility for the purpose of producing high octane gasoline for aviation purposes in connection with the war effort. The construction of this plant was completed in June 1944 and the same as to the personal property comprised therein was taxable as such for said tax years as a part of the appellant's machinery and equipment at its Cleveland refinery, in Cleveland Taxing District, Cuyahoga County, Ohio. The total cost of constructing this catalytic cracking plant which consisted of a six case cracking unit,

a three case cracking unit and auxiliary structures and equipment, was $9,099,360.39. The greater part of this construction work was done by the E. B. Badger and Sons Company of Boston, Massachusetts, under a contract therefor with the appellant company at a cost of $7,669,032.76; and the balance of the work in the construction of this plant or unit—which consists principally in the installation of auxiliary equipment—was performed by The Standard Oil Company itself at a cost of $1,430,327.65. The contract of the Badger Company for the work to be done [fol. 136] on an overall definitive estimate of $5,249,930, including labor and material as well as the contractor's fee in the amount of $566,880. It thus appears that as compared with the estimate there was an overrun in that part of the work done by the Badger Company under its contract with the appellant in the amount of $2,419,102.76. The appellant concedes that a part of this overrun amounting to the sum of $995,250 was due to additional items or other factors entering into the work done by the contractor, which were beyond that contemplated by the contract and which resulted in increased value to the completed work done by the Badger Company in the construction of this plant. Appellant contends however that the balance of said overrun, amounting to $1,423,852 represented increased costs and expenses which were occasioned by unavoidable delays in the construction of said work and by other conditions of such nature, and that these increased costs and expenses in the amount herein stated did not add anything to the value of the completed plant; and that there should be an initial deduction of this amount from the total cost of the project as one of the steps in determining the true value of the completed unit for the tax years here in question. As to this the tax commissioner apparently concedes that of the total amount of this overrun the sum of $988,000 thereof represents costs and expenses which were not reflected in the value of the completed plant [fol. 137] or unit. This overrun allowance made by the Department of Taxation and tax commissioner was on a percentage basis which was in line with an overrun allowance theretofore made by the tax commissioner with respect to a catalytic cracking plant of like kind constructed by another oil refining company in this state in the year

1939, at which time conditions affecting construction work of the kind here in question were obviously different from the conditions which obtained during the war years when the plant here in question was constructed. Moreover, the overrun allowance made by the Department of Taxation and by the tax commissioner in the amount above stated was, apparently, limited to some extent by the erroneous view entertained in the Tax Department that the catalytic cracking plant or unit of the appellant as constructed and completed was capable of processing fifty per cent more fuel as feed stock in the production of gasoline than that contemplated by the contract based upon the estimate above referred to. As to this it appears that this catalytic cracking plant as completed and put in operation then was and now is capable of processing daily 15,000 barrels of fuel oil as feed stock in the production of gasoline, and that this capacity of the plant was contemplated by the parties in the execution of the Badger Company contract for its construction. In this situation it is a matter of some difficulty to determine the amount [fol. 138] of the overrun on the cost and expense of constructing this project due to costs and expenses which are not reflected in the value of the plant as completed for operation. However, on a consideration of all of the evidence in this case we are of the view that an allowance of $1,200,000 should be made on this account; and that a deduction of this amount should be made from the overall cost and expense of constructing the plant for the purpose of determining that part of the cost of such construction which is related to the true value thereof as a completed structure.

The appellant further contends that the construction cost of this plant as reduced by the overrun allowance should be further reduced by bringing such cost down to the construction cost level for the year 1939, which year, the appellant assumes, was the last year in which construction costs were reasonably normal. The construction work on this project was largely done in the year 1943, at which time construction costs, the appellant claims, were abnormally high was compared with those for the year 1939. In this connection it appears from the evidence (appellant's exhibit 15) that taking the figure 100 as the index basis

for construction cost in the year 1913 the index for construction costs for the year 1943 was 290 and that for the year 1939 was 236; which last named index figure is 81.4% of that for the year 1943. And appellant's contention is that this percentage should be applied to the net [fol. 139] cost of the construction of the plant as above determined for the purpose of bringing such cost down to the 1939 level as an index to the true value of the plant as constructed. As to this it is noted from the evidence that following the year 1939 and through the war years there was a steady and substantial increase in construction cost, and that following the end of the war there was a tremendous increase in construction cost; so that during the year 1947 the index for such cost for said year on the basis above noted was about 390 as compared with the index figures given with respect to the years 1939 and 1943. And based upon information readily available in engineering journals and other like sources, judicial knowledge can be taken of the fact that construction costs for the years 1948 and 1949 were substantially higher than those for the year 1947. It is apparent that construction cost during the latter part of the year 1942, during the year 1943 and during the first half of the year 1944, during which time this plant was under construction, were substantially less than the average of such construction costs from the year 1939 to 1949, inclusive. In this situation and inasmuch as no one can readily foresee the time when construction costs will be comparable to those for the year 1939 or to those for the year 1943, for that matter, we are of the view that consistently with the rule that in the [fol. 140] determination of true value of a fixed asset of this kind such value should be considered as something fairly constant over a period of time, and that while the assessment of such property is made as of a day certain the value thereof is established over a period of years, we can without injustice to the appellant take the actual net construction cost of this catalytic cracking plant as above determined as an index of its true value for tax purposes. In this view appellant's contention that the actual net cost of this plant should be reduced to the 1939 cost level, must be denied.

Giving effect to the figures above found and determined and deducting $1,200,000 as the amount of the overrun from

$9,099,360, the overall cost of the Houdry catalytic cracking plant, we obtain $7,899,360 as a figure representing that part of the cost of the plant contributing to the value of the plant as completed. As to this it appears, however, that 10.6% of this cost amounting to $837,332, was for the construction and installation of structures and equipment which were properly classified as real property. Deducting this sum from $7,899,360 leaves us $7,062,028 as that part of the cost which is reflected in the value of the plant as personal property. It further appears, however, that of the amount last named the sum of $135,000 represents the cost of constructing foundations for an additional three case cracking unit as a [fol. 141] part of the plant, which was never completed; and which foundations, as idle equipment were given a value of $13,500 instead of $135,000, the cost of constructing the same. Making a proper adjustment of these figures we arrive at a valuation of the plant as personal property as of July 1, 1944, in the amount of $6,940,528. Giving to this figure as the valuation of the plant as of July 1, 1944, a depreciation of 5%, amounting to $347,026, we determine the true valuation of the plant as personal property on and as of tax listing date, January 1, 1945, to be $6,593,502.

A further question presented in this case with respect to the assessment of appellant's machinery and equipment in Cleveland City Taxing District for the tax year 1945—including, of course, the Houdry catalytic cracking plant above referred to—is on an assignment of error that the tax commissioner on consideration of the appellant's application for review and redetermination as to the assessment complained of did not allow a reduction of the valuation of such machinery and equipment to or under the book value thereof notwithstanding the fact that the appellant did not for said tax year file any (902) claim as authorized and provided for by section 5389, General Code. As to this it appears that the appellant in filing its inter-county or consolidated personal property tax return for the tax year 1945 set out its machinery and equipment in Cleveland City [fol. 142] Taxing District at a book valuation of $10,591,041. However the appellant did not in said tax return list this property as machinery and equipment used in manufacturing at a 50% valuation based on the book value of the property; but it did list this property at a 50% valuation

based upon the true value of this machinery and equipment, which true value was set out in said tax return as $11,491,043 and which true value as returned by appellant was apparently the book value of this machinery and equipment as depreciated in accordance with the .302 formula prescribed by the tax commissioner which had been in effect for some years. And it further appears in this connection that the appellant paid the taxes for said tax year on this machinery and equipment on a list or assessed valuation based on this true value of the property as returned by the appellant. And apparently, the appellant paid the taxes on its machinery and equipment in this taxing district upon an assessment certificate directed to it and to the county auditor by the tax commissioner under date of August 13, 1945, after the tax commissioner had made an audit of appellant's tax return for said year. In this assessment certificate the tax commissioner set out the *assessed value* of all of the appellant's tangible personal property in Cleveland City Taxing District at $8,684,960. And in making this assessment certificate it does not appear that the tax commissioner in making his audit of appellant's tax return increased or [fol. 143] otherwise changed either the true valuation or list valuation of appellant's machinery and equipment in said taxing district as the same were set out in said tax return. Thereafter on February 11, 1947, the tax commissioner on reaudit of appellant's personal tax return for the year 1945 increased the *assessed* valuation of all of the appellant's tangible property in Cleveland City Taxing District from $8,684,960, as above stated, to $8,887,540—an increase of the list or assessed valuation of such property in the amount of $202,580. It does not appear, however, that the tax commissioner in making this increase in the *list* or assessed valuation of appellant's tangible personal property in Cleveland City Taxing District increased or otherwise changed the valuation of appellant's Houdry catalytic cracking plant or other machinery and equipment in the taxing district. On the contrary it appears that this increase in the list or assessed value of such tangible personal property was due solely to an adjustment and resulting increase made by the tax commissioner in the valuation of th appellant's inventory property at this location.

Following the receipt of this amended certificate of valuation made by the tax commissioner, the appellant on March 12, 1947, filed with that officer an application for review and redetermination of said amended assessment in which no complaint is made as to the only increase made in and by said amended assessment, but in which, among other things, the appellant said:

> [fol. 144] "Our claim is that the aggregate assessed value of tangible property in Cleveland, shown on the amended preliminary assessment certificate as $8,887,540.00 should be reduced by $2,373,630.00 since the listed value of the machinery and equipment at the Catalytic Cracking Plant in our Cleveland refinery should be not $3,873,636, the amount for which it was assessed in the amended preliminary assessment certificate, but $1,500,000.00."

Assuming that the *list* or *assessed* value of the Houdry catalytic cracking plant was $3,873,636, as stated by the appellant in its application for review and redetermination, it follows that since this catalytic cracking plant as machinery and equipment used in manufacturing was listed at 50% of its true value both in the amended assessment certificate and in the original assessment certificate, the true value of this catalytic cracking plant as the same was returned for taxation by the appellant as a part of all of its machinery and equipment in the Cleveland City Taxing District must have been $7,747,272.

In this situation it appeared when this application for review and redetermination came on for consideration by the tax commissioner that the true value of all the machinery and equipment owned and used by the appellant in refining in Cleveland, Cuyahoga County, and upon the basis of which the appellant paid taxes on such property for the year 1945, was $900,002 more than the book value of such machinery and equipment as returned by the taxpayer for said year. The tax commissioner upon consideration of the ap- [fol. 145] plication for review and redetermination found that the catalytic cracking plant above referred to was "assessed in excess of the true value thereof in the amount of $988,000 by reason of allowable excessive costs and equip-

ment not in use but that in view of the judicial determination (Willys-Overland Motors, Inc. v. Evatt, 141 O. S., 402) he is without jurisdiction to find a value below net depreciated book value and orders that the value of such property be reduced in the amount of $561,027.00 being the amount that the machinery and equipment used in manufacturing in Cuyahoga County exceeded the net depreciated book value thereof, and it is ordered that a final assessment certificate issue correcting the assessment in the amount so stated." This figure of $561,027, above noted, was the amount by which the true value of all machinery and equipment used by the appellant in refining throughout the state as the same was returned by the appellant exceeded the book value thereof as set out in appellant's tax return. And the tax commissioner, apparently, used this figure in making the reduction above noted instead of the figure of $900,002 as intended. The tax commissioner after giving effect to the reduction made by him as above noted and after making certain increases in the valuation of this machinery and equipment in the aggregate amount of $47,425 due to an adjustment of depreciation rates as to some items of such [fol. 146] property and to the valuation of certain items of machinery and equipment in progress of construction, fixed the valuation of such machinery and equipment in Cleveland Taxing District in the sum of $10,977,441.

Although the tax commissioner on the consideration of the appellant's application for review and redetermination had no jurisdiction and authority to reduce the valuation of this machinery and equipment below the book value thereof in the absence of a 902 claim for such reduction, Willys-Overland Motors, Inc. v. Evatt, Tax Commr., 141 O. S., 402; Wright Aeronautical Corp. v. Glander, Tax Commr., 151 O. S., 29, said officer upon his finding of an overrun in the cost of constructing said catalytic cracking plant, would have been warranted in reducing the valuation of the machinery and equipment in this taxing district down to the sum of $10,591,041, the book value thereof, were it not for the fact that the appellant had previously paid taxes on this property at a higher valuation. As to this it will be recalled that the appellant returned this machinery and equipment for taxation at a true valuation of $11,491,043 including, apparently, said catalytic cracking plant at a valuation of

$7,747,272; and taxes were paid by the appellant for the tax year 1945 on the basis of this true value of the property as returned by the taxpayer. In this situation the question presented to the Board of Tax Appeals upon this appeal as to the right of the taxpayer to a reduction in the valuation of this machinery and equipment from the valuation of [fol. 147] $11,491,043, at which it was returned by the appellant for purposes of taxation to the sum of $10,591,041, the book valuation of this property, is a moot question which this Board is not authorized or required to determine. The Central Iron and Metal Co. v. Evatt, 27 O. O. 1. See Board of Education v. Budget Commission, 139 O. S. 312, 313; Minor v. Witt, 82 O. S. 287; Travis v. Public Utilities Commission, 123 O. S., 335. It follows, therefore, that the final order made by the tax commissioner on appellant's application for review and redetermination (assuming, but not deciding, that said application was timely and properly filed) with respect to the true valuation of appellant's machinery and equipment including said catalytic cracking plant in Cleveland City Taxing District for the tax year 1945, must be, and hereby is, affirmed; and this notwithstanding the fact that, as above noted, this Board has herein found and determined that the true value of said catalytic cracking plant on and as of January 1, 1945, was substantially less than the valuation at which this plant was returned for taxation and upon which the taxes were paid.

A further question presented in case No. 14381 is on an appeal by the appellant from a final order of the tax commissioner on appellant's application for review and redetermination with respect to the valuation of said Houdry [fol. 148] catalytic cracking plant for the tax year 1946. As to this it appears that the appellant in its personal property tax return for the tax year 1946 returned its machinery and equipment in Cleveland City Taxing District at a true value of $4,082,711; which valuation did not include that of the Houdry catalytic cracking plant, the cost of which plant as a war facility had been depreciated or amortized down to zero on the books of the company. However, the 902 claim filed by the appellant with its tax return states that the valuation of the machinery and equipment in the Cleveland Taxing District as returned by the appellant "should be increased by $3,000,000 to reflect and include the true

value of the Houdry unit." On August 12, 1946, the tax commissioner issued a preliminary assessment certificate on and with respect to the tangible personal property returned for taxation by the appellant for said tax year. Thereafter, on or about the month of December, 1946, the tax commissioner made a reaudit of appellant's tax return for said year in which that officer found and determined that the true value of said catalytic cracking plant for the tax year 1946 was $6,916,129; and adding this amount to the valuation of the machinery and equipment other than said catalytic cracking plant returned by the appellant as aforesaid, the tax commissioner determined the true valuation of appellant's machinery and equipment in the Cleveland Tax-
[fol. 149] ing District to be $10,998,840. Following this reaudit the tax commissioner made and certified an amended assessment certificate including therein the assessed value of the Houdry plant as determined on said audit. Following the certification of this amended preliminary tax assessment the appellant filed with the tax commissioner an application for review and redetermination in which it stated that the true value of the machinery and equipment in the catalytic cracking unit, as of January 1, 1946, was $3,000,000, and that it should accordingly be included in its 1946 personal property tax assessment at a listed value of $1,500,000 instead of $3,458,060, the listed value at which the tax commissioner included it in his amended preliminary assessment certificate.

The tax commissioner upon consideration of appellant's application for review and redetermination allowed a reduction of $932,360 from the cost of the construction of said catalytic cracking unit by reason of excessive costs not contributing to the value of the unit; and giving effect to such reduction in the original cost of the construction of this unit, the tax commissioner determined that this catalytic cracking plant or unit had a valuation on and as of January 1, 1946, of $5,983,769. And the tax commissioner after including certain machinery and equipment which the appellant had failed to list in its tax return, some of which was in process of construction, determined that all of the
[fol. 150] appellant's machinery and equipment in Cleveland Taxing District had a valuation of $10,960,267 for the tax year 1946.

On the presentation of this case to the Board of Tax Appeals on this appeal, the appellant upon considerations above discussed and to some extent denied herein contends that this Houdry catalytic cracking plant as personal property on and as of the time of the completion thereof, July 1, 1944, had a valuation of $5,589,707. In the determination of the valuation of this plant for the tax year 1946 the appellant contends on the basis of some supporting evidence that 60% of the cost of constructing this plant consisting, as above noted, of a six case cracking unit and a three case cracking unit, was attributable to the six case cracking unit, and that 40% of the total cost was in the construction of the three case cracking unit. With this assumption the appellant ascribes a valuation to that part of the plant as personal property other than the three case unit and the foundations for the additional cases which were never constructed, of $3,353,824. Giving this stated valuation a depreciation of 15%, amounting to $503,073, the appellant determines the true value of the personal property in the Houdry plant other than the three case unit and the additional foundations a value of $2,850,751 as of January 1, 1946.

[fol. 151] Further in this connection the appellant contends that aside from the fact, as claimed, that this Houdry catalytic cracking plant, which was of the fixed-bed catalytic type, was to some extent outmoded by January 1, 1946, by reason of the development and use in the industry of the fluid type of catalytic plant, the three case unit, it is contended, became obsolete on the termination of the war; and this for the reason, as claimed, that this unit was no longer needed for making high octane gasoline for aviation purposes and appellant could have refined motor vehicle gasoline more economically by the use of its thermal cracking unit and the six case cracking unit without making any use of the three case unit. And in this view the appellant contends, in effect, that the only value that the three case unit had on January 1, 1946, was such value as the unit might have in the contemplated conversion of the same into a catalytic cracking unit of the fluid type; and that the value of the three case unit was between $700,000 and $1,000,000. Grouping this three case unit and the foundations of the once projected but never finished additional three case unit

together, the appellant ascribes a value to the same of $1,000,000. Adding this sum to the determined true value of personal property in the Houdry plant other than the three case unit and such additional foundations, the appellant determines the true value of the Houdry catalytic plant as of Janary 1, 1946, to be $3,850,751.

[fol. 152] In the consideration of the immediate question here presented it is noted that although this three case cracking unit in its normal operation processed a considerable quantity of virgin feed stock obtained both from the crude and vacuum pipe stills operated by the company at this refinery, the greater amount of feed stock which went into this three case unit was that which was obtained as an end product from both the thermal and six case cracking units; and that the chief purpose of the three case unit was to give to the gasoline processed by it a higher octane quality than the gasoline produced in either the thermal cracking unit or in the six case catalytic cracking unit. In this connection it appears from the evidence (appellant's exhibit 25A) that during the calendar year 1945, including nine months of the war period, the amount of feed stock of various kinds processed in this three case catalytic cracking unit was 4601 barrels; in the calendar year 1946, 4291 barrels; in the calendar year 1947, 4096 barrels; and during the first six months of the calendar year 1948, 3820 barrels. It appears that although following the end of the war there was a marked decrease in the demand for aviation gasoline there was at that time a greater increase in the demand for gasoline for motor vehicle use. And in meeting this demand the company as late as June 1948 was making a more active use of this three case cracking unit [fol. 153] than was made of it during the last of the war years. In this situation the Board is not impressed by the contention of the appellant that on and as of January 1, 1946, this three case unit was obsolete and that it had no valuation other than such as it might have for conversion purposes. On the contrary we are of the view that on January 1, 1946, as on January 1, 1945, this three case unit should be considered as a part of the Houdry catalytic cracking plant as a whole and as an operating unit thereof.

Coming to the determination of the value of the Houdry catalytic cracking plant as personal property for the tax

year 1945 and as of January 1 in said year, the Board has found herein that the value of the plant on and as of July 1, 1944, was and is the sum of $6,940,528. Giving to this valuation a depreciation of 15% covering the period of time between July 1, 1944, and January 1, 1946, and amounting to $1,041,089, the Board determines the value of this plant on and as of January 1, 1946, to be $5,899,439. Inasmuch as this valuation of the plant is slightly less than that determined by the tax commissioner in the final order complained of herein such final order is hereby modified in order to conform to the finding of the Board with respect to the valuation of this plant.

As before indicated herein the appellant's findings in cases Nos. 12488 and 14381 present questions relating to the assessment of certain unfinished machinery and equip-
[fol. 154] ment which was in process of construction at the appellant's Cleveland refinery on tax listing day for the tax years 1943, 1944, 1945 and 1946, respectively. As to the tax years 1943 and 1944, the only property of this kind here in question was the then unfinished Houdry catalytic cracking plant or unit above referred to; and as to the tax years 1945 and 1946, the property in question was certain other capital equipment which was unfinished and in the process of construction on tax listing date in said respective years.

Upon considerations relating to the construction and application of sections 5328 and 5325-1, General Code, the appellant contends, as before noted, that personal property of this kind is not taxable at all; and, in the alternative, the appellant further contends that if it is determined that this property is taxable, it should be assessed, not as machinery and equipment, but either on the average basis as personal property of a manufacturer within the purview of sections 5385 and 5386, General Code, or as "idle equipment" and at 10% of the cost thereof pursuant to the tax commissioner's directive under date of May 6, 1943, relating to the assessment of property in this category. As before noted, the Board is of the view that the property here in question is taxable. And it remains for us to determine the manner in which this property should be assessed and the valuation of the same for pur-
[fol. 155] poses of taxation in said respective tax years.

Appellant's contention that personal property of a manufacturer of this kind and in this condition should be assessed on the average basis provided for by sections 5385 and 5386, General Code, is predicated on the stated view that clause 4: "When stored or kept on hand as material, parts, products or merchandise" as the same is found in section 5325-1, General Code, defining the term "used" within the purview of section 5328, General Code, providing for the taxation of personal property "used in business," is intended to cover inventories of all kinds, and is coextensive with section 5385, General Code, which provides for the assessment on the average value basis: "* * * of all articles purchased, received or otherwise held for the purpose of being used, in whole or in part, in manufacturing, combining, rectifying or refining, and of all articles which were at any time by him manufactured or changed in any way, * * *". As to this, we are of the view that the "articles" referred to in the above quoted provisions of section 5385, General Code, refers solely to articles from which and out of which the manufactured products are made—that is, the manufacturer's raw material or stock,—Sebastian v. Ohio Candle Co., 27 O. S., 459, 463; Engle v. Sohn, 41 O. S., 691, 693; Commissioners v. Rosche Bros., 50 O. S., 103, 109; and the "articles" [fol. 156] therein referred to do not, in our opinion, include machinery, tools or other equipment by means of which such articles as the manufacturer's raw material or stock are transformed, changed or otherwise used in the manufacture of the finished product. In this connection it is noted that section 5386, General Code, which makes provision as to the manner in which the average value of the personal property of the manufacturer, so assessed is to be determined, further provides as follows:

> "A manufacturer shall also list all engines and machinery of every description used, or designed to be used, in refining or manufacturing, and all tools and implements of every kind used, or designed to be used, for such purpose, owned and used by such manufacturer."

This statutory provision is not only persuasive to the view that the property here in question which is "designed

to be used" in refining and manufacturing, is taxable, but, read with the applicable provisions of section 5388, General Code, this provision leads to the view that property of this kind is to be assessed, not on the average value thereof, but upon the true value thereof as of tax listing day, and is to be listed at 50% of such true value.

The appellant further contends that if this unfinished machinery and equipment is not assessable on the average [fol. 157] value thereof under the provisions of sections 5385 and 5386, General Code, then and in that event this property should be assessed as idle equipment at 10% of the original cost thereof under a directive of the tax commissioner under date of May 6, 1943, which is as follows:

> "Subject: Valuation of Idle Equipment: Dated 5/6/43: Such equipment shall, under certain conditions, be listed at 10% of original cost; such cost to include that of foundation and installation.
>
> Temporary idleness for purpose of overhauling and repair or resulting from seasonable operations is not sufficient cause.
>
> Equipment ordinarily entitled to such listing would be that in buildings boarded up, in departments closed off, or removed from production line.
>
> To receive such consideration, the taxpayer must file a claim, in writing, at the time of filing the return.
>
> Such claim should show cost and value as listed in the return and other necessary information in support of the claim."

As to the contention of the appellant it may be observed that aside from the question (not here decided) as to the authority of the tax commissioner to make and issue this directive—it is not a rule—in view of the requirement that machinery and equipment is to be assessed on the basis of the true value thereof and listed at 50% of such true value, and aside from the obvious view that the property here in question does not come within either the letter or [fol. 158] purpose of this directive, the appellant can not in these cases avail itself of this directive for the purpose intended, and this for the reason it did not in making its tax returns for the several tax years here in question make

any claim that this property should be taxed as idle equipment.

It follows from what has been said that the Board is of the view that this unfinished machinery and equipment here in question is to be taxed as personal property and as is other machinery and equipment on the basis of the true value thereof on and as of tax listing day of the several tax years above referred to, and is to be assessed at a list valuation of 50% of such true valuation as prescribed by section 5388, General Code. As above noted, the only personal property of this description which is involved in this case with respect to the tax years 1943 and 1944 is the then unfinished Houdry catalytic cracking plant. As to this it further appears that on and as of January 1, 1943, the overall cost of that part of the plant represented by the personal property therein was $435,000. In this case it is noted that the Board in determining the true valuation of the then completed Houdry plant on and as of July 1, 1944, deducted from the overall cost of the plant that part thereof represented by excessive costs and expenses of the construction which did not contribute to the value of the plant, which excessive costs and expenses [fol. 159] amount to $1,200,000—about 13.2% of the overall cost of the plant. Applying as a deduction the same percentage of overrun to the overall cost of the unfinished structure on and as of January 1, 1943, we determine the true value of the plant as of said date to be $377,580 (list value $188,790). On and as of January 1, 1944, the overall cost of the plant as personal property was $6,220,575. Deducting from this sum the same percentage of overrun for excessive costs and expenses in construction, the true value of the plant as of said date is determined to be the sum of $5,399,459 (list value $2,699,729). By January 1, 1945, the Houdry catalytic cracking plant had been completed and was then in operation. However, the appellant company had at that time certain other unfinished equipment which was in progress of construction and to which the tax commissioner ascribed a true value for said tax year of $80,652, of which $41,716 was the value of that part of the property which was intended for use in manufacturing and which was assessed at 50% of such value, and $38,936 was regarded as the value of that part of the unfinished

equipment which was intended for use other than manufacturing, and which was assessed at 70% of such value. There is nothing in the evidence to show that there was any overrun on account of excessive costs and expenses in the construction of this unfinished equipment; and the valuation placed upon the same by the tax commissioner is hereby determined to be correct.

[fol. 160] On January 1, 1946, the appellant had in process of construction certain then unfinished equipment the cost of which up to that time was $928,686 of which $904,631 represented the then cost of machinery intended to be used in manufacturing and which was assessed at 50% of such valuation, and $24,055 represented that part of the unfinished equipment which was intended to be used for other purposes and which was assessed at 70% of valuation. There is no suggestion in the evidence that any part of the cost of constructing this equipment was due to an overrun of excessive costs and expenses not contributing to the value of the equipment. And the order of the tax commissioner determining the true value of the equipment in accordance with the figures above stated is hereby affirmed. Inasmuch as the true valuation of the unfinished Houdry catalytic cracking plant on and as of January 1, 1943, and January 1, 1944, respectively, as here determined, are somewhat less than the valuations of said property as of said respective dates, the order of the tax commissioner determining such valuations is hereby modified so as to conform to the findings of the Board. As to the unfinished equipment of the appellant which was in progress of construction on January 1, 1945, and January 1, 1946, the true valuations thereof as determined by the tax commissioner are hereby affirmed.

Case No. 14514, hereinbefore referred to, is an appeal [fol. 161] filed herein by the appellant above named under date of June 17, 1948, from a final assessment made by the tax commissioner under date of May 19, 1948, under the assumed authority of section 5395, General Code, on and with respect to tangible personal property of the appellant for the tax year 1945 including machinery and equipment and other tangible personal property at Cleveland refinery in Cleveland City Taxing District, Cuyahoga County, Ohio, the assessment of which property for said tax year as

modified on the appellant's application for review and redetermination was confirmed by the tax commissioner by a final order of the tax commissioner under date of April 14, 1948, and from which order said appellant filed an appeal with this Board under date of May 13, 1948; which appeal was docketed as one of the appeals in case No. 14381, and is considered and determined herein. By reason of the provisions of section 5395, General Code, which excludes from the list of taxable property as to which a final assessment may be issued under the authority of this section "any taxable property concerning the assessment of which an appeal has been filed under section 5611 of the General Code," the Board is of the view that the tax commissioner was without authority to issue this final assessment on and with respect to machinery and equipment and other tangible property of the appellant in Cleveland City Taxing District, which was the subject of the appeal filed [fol. 162] herein in case No. 14381, above referred to, and in this respect the final assessment and assessment certificate of the tax commissioner under date of May 19, 1948, is reversed, set aside and held for naught. This order is without prejudice to the issues with respect to the assessment of said personal property as the same has been considered and determined on the appeal for the tax year 1945 filed herein under date of May 13, 1948.

Except as otherwise indicated herein the order and assessments complained of in these several appeals are affirmed; and the several cases above noted are remanded to the tax commissioner with directions to make and issue corrected assessment certificates in conformity with the findings and determinations of the Board made herein.

See memo. attached.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation of Ohio this day made with respect to the above matter.

(Sgd.) Joseph D. Bryan, Secretary.

BBP.

[fol. 163] CONCURRING MEMORANDUM.

SHERICK:

I concur in all matters decided, save and except that portion of the first question presented and determined, which has to do with the taxation of boats and barges transporting crude oil between Mississippi river points and Mt. Vernon, Indiana, and Bromley, Kentucky. Since the State of Kentucky owns to the north shore of the Ohio river at low water mark, and these boats and barges never docked in Ohio ports, such boats and barges never entered the State of Ohio during the taxing period. I am of equally firm opinion that the Board of Tax Appeals has no power or authority to declare all or any part of an Act of the Legislature unconstitutional. I feel that taxation of these vessels can only be sustained upon the words "*in navigating any of the waters* within or *bordering on this state, whether such ships, vessel, or boat is within the jurisdiction of this state or elsewhere,*" as found in G. C. Section 5325. To my notion any such purpose and intent to tax tangible personal property has already been held unconstitutional in the case of Floyd v. Light and Heat Co., 111 O. S., 57. The court therein was considering G. C. Section 5424 and the right, purpose and intent of the State of Ohio to tax tangible personal property sitused outside of Ohio. In broad and general terms the court therein said at pages 74 and 75:

[fol. 164] "Another important principle to be observed is that which forbids *any attempt* to levy taxes upon property beyond the territorial boundaries of the state. This is a *general principle which has application to all forms of taxation.*"

"Upon principle as well as upon the authority of these cases we adhere to the doctrine that in the construction of Section 5424, General Code, *there must be no taxation of property not 'within this state.'*"

I fully realize that these observations are not carried into the syllabi, but the statements made are so uniformly the law of the land, and so broad and comprehensive in scope in condemning any such legislative purpose, intent and design in any statute enacted to that end, that what is therein said

is as fully applicable to G. C. Sec. 5325 as it was to G. C. Sec. 5424. The very principle sought to be accomplished in G. C. Sec. 5325 was found therein not to be able of accomplishment. The words *"any attempt"* to my notion are synonymous with *"any statute which attempts."*

I feel fortified in my conclusion by the statement of the court made in Columbus Met. Housing Auth. v. Thatcher, Aud., 140 O. S., 38. The court therein had this to say, on page 43 thereof, concerning the ommission of the word "exclusively" from G. C. Sec. 5351, an exemption statute:

> "The word 'exclusively' may not be read out of this section (5351) and *any statute which intentionally disregard- this feature would be unconstitutional.*"

[fol. 165] The errors in said decision which Appellant deems prejudicial to it, and of which it complains, listed separately with respect to each of the consolidated cases, are as follows:

A. With respect to Case No. 12488

1. The decision of the Board of Tax Appeals is unreasonable and unlawful.

2. The Board of Tax Appeals erred in holding that any machinery in process of construction could legally be included in the assessment of Appellant's tangible personal property for 1943 or 1944.

3. Even if machinery in process of construction were properly includible in the assessment of Appellant's tangible personal property for 1943 or 1944, the Board of Tax Appeals erred in valuing it at more than its true value in money, which was $298,845 for 1943 and $4,273,535 for 1944, and in assessing it at more than fifty percent of such values.

4. Even if machinery in process of construction were properly includible in the assessment of Appellant's tangible personal property for 1943 or 1944, the Board of Tax Appeals erred in failing to hold that it must be valued on the average value basis referred to in Section 5386 of the General Code, and in failing to hold that it must be assessed at fifty percent of such average values.

[fol. 166] 5. The Board of Tax Appeals erred in holding that there should be included in the total final assessed

value for Cleveland Taxing District for 1943 an assessed valuation of $188,790 for machinery in process of construction, whereas properly no machinery in process of construction should have been included therein.

6. The Board of Tax Appeals erred in holding that there should be included in the total final assessed value for Cleveland Taxing District for 1944 an assessed valuation of $2,699,729 for machinery in process of construction, whereas properly no machinery in process of construction should have been included therein.

7. The decision of the Board of Tax Appeals is contrary to law, not supported by the evidence and against the weight of the evidence, and contains other errors apparent on the face of the record.

B. With respect to Case No. 14381

1. The decision of the Board of Tax Appeals is unreasonable and unlawful.

2. The Board of Tax Appeals erred in failing to hold that the taxation of any of Appellant's crude oil boats and barges by the State of Ohio for the years 1945 and 1946 would violate the statutes of Ohio, in view of the fact that during such years such boats and barges were not used in Ohio, and their use in waters bordering on Ohio was insubstantial.

[fol. 167] 3. The Board of Tax Appeals erred in failing to hold that taxation of any of Appellant's crude oil boats and barges by the State of Ohio for the years 1945 and 1946, even if permitted by the Ohio statutes, would deprive Appellant of its property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, since such boats and barges had no taxable situs in Ohio for either of such years.

4. The Board of Tax Appeals erred in failing to eliminate entirely from Appellant's 1945 personal property tax assessment its crude oil boats and barges, which were found by the Tax Commissioner to have a true value of $1,213,322, and in failing to eliminate entirely from Appellant's 1946 personal property tax assessment Appellant's boats and barges which were found by the Commissioner to have a true value of $1,201,885.

5. The Board of Tax Appeals erred in indicating that all the taxes assessed against Appellant's boats and barges for 1945 and 1946 had been paid, whereas in fact only a portion of the taxes assessed against such boats and barges for each such year have been paid.

6. The Board of Tax Appeals erred in holding that any machinery in process of construction could legally be included in the assessment of the Appellant's tangible personal property in Cuyahoga County for 1945 or 1946.

[fol. 168] 7. Even if machinery in process of construction were properly includible in the assessment of Appellant's tangible personal property in Cuyahoga County for 1945 or 1946, the Board of Tax Appeals erred in failing to hold that it must be valued on the average value basis referred to in Section 5386 of the General Code, and failing to hold that it must be assessed at fifty percent of such average value.

8. The Board of Tax Appeals erred in holding that there should be included in the Appellant's personal property tax assessment for Cleveland City Taxing District for 1945 a true value of $33,979 for machinery in process of construction intended to be used in manufacturing, and a true value of $30,664 for machinery in process of construction intended not to be used in manufacturing, whereas properly no machinery in process of construction should have been included therein.

9. The Board of Tax Appeals erred in holding that there should be included in the Appellant's personal property tax assessment for Cleveland City Taxing District for 1946 a true value of $893,788 for machinery in process of construction intended to be used in manufacturing, and a true value of $10,510 for machinery in process of construction intended not to be used in manufacturing, whereas properly no machinery in process of construction should have been included therein.

[fol. 169] 10. The Board of Tax Appeals erred in making an inadequate allowance for wholly excessive costs in the valuation of the personal property in Appellant's catalytic cracking plant at Cleveland for the tax years 1945 and 1946.

11. The Board of Tax Appeals erred in holding that no reduction should be made in the valuation of the personal property in Appellant's catalytic cracking plant at Cleveland for the years 1945 and 1946 to reflect the inflated level

of general construction costs during the war years in which such plant was constructed. The Board also erred in considering events occurring in years subsequent to 1945 and 1946 in arriving at the valuation of the personal property in said plant for 1945 and 1946, and in holding that the "net construction cost" of said plant could justly be used as "an index of its true value for tax purposes."

12. The Board of Tax Appeals erred in holding that the true value of the personal property in Appellant's Cleveland catalytic cracking plant as of January 1, 1945 was in excess of $5,310,222.

13. The Board of Tax Appeals erred in holding that even though the net book value of Appellant's personal property used in manufacturing in Cleveland Taxing District on January 1, 1945 was $900,002 less than the valuation on the basis of which Appellant had paid its 1945 personal property taxes, and even though the true value of such [fol. 170] property on such date, as found by the Board, was even less than such net book value, nevertheless the fact that Appellant had paid its personal property taxes for 1945 without protest on such higher valuation basis rendered the matter moot and deprived the Board of authority to reduce the valuation of such property for such year even by $900,002, which would bring its valuation down to the net book value thereof.

14. The Board of Tax Appeals erred in denying, on December 15, 1949, Appellant's application for rehearing, which was based on the matters set forth in 13 above.

15. The Board of Tax Appeals erred in refusing to make any reduction in the valuation for 1946 of the personal property in Appellant's catalytic cracking plant at Cleveland to reflect the obsolescence and peacetime inutility of the three-case unit thereof, which was constructed for war purposes and could be used economically only for war purposes.

16. The Board of Tax Appeals erred in holding that the true value of Appellant's Cleveland catalytic cracking plant as of January 1, 1946 was in excess of $3,850,750.78.

17. The Board of Tax Appeals erred in failing to order a reduction in the true value as of January 1, 1946 of personal property of Appellant used in manufacturing in Cleve-

[fol. 171] land City Taxing District to $7,933,461, and in failing to order a reduction in the true value as of January 1, 1946 of personal property of Appellant not used in manufacturing in Cleveland City Taxing District to $813,085.

18. The Board of Tax Appeals erred in denying Appellant the right to cross-examine the Tax Commissioner's witness Mr. Adams with respect to his valuation of the catalytic cracking plant of the Sun Oil Company, with respect to which Mr. Adams had testified on direct examination as bearing on the valuation which he had made of Appellant's catalytic cracking plant for the years 1945 and 1946, and in denying Appellant the right to make profert of Mr. Adams' probable testimony in order to show that the error in denying such right of cross-examination was prejudicial.

19. The decision of the Board of Tax Appeals is contrary to law, not supported by the evidence and against the weight of the evidence, and contains other errors apparent on the face of the record.

C. With respect to Case No. 14514

Appellant assigns no error to the decision of the Board of Tax Appeals in Case No. 14514, since that case was an appeal from a final assessment for the year 1945 and the Board held in its decision that such final assessment should not have been made and was a nullity.

[fols. 172-197] Wherefore, Appellant prays that this Honorable Court modify the decision and entry of the Board of Tax Appeals hereinbefore quoted so as to correct the errors herein complained of, and that it enter final judgment in accordance with such modification.

Respectfully submitted, The Standard Oil Company, Appellant, by (S.) McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett, Attorneys for The Standard Oil Company, Appellant.

[fol. 198] BEFORE BOARD OF TAX APPEALS

NOTICE OF APPEAL

(Personal Property Tax Assessment for 1945)

(No. 14,381)

(Filed May 13, 1948)

The Standard Oil Company, appellant herein, hereby gives notice of appeal to the Board of Tax Appeals from the final determination made by the Tax Commissioner of Ohio with respect to the application of appellant for review and redetermination of an increased personal property tax assessment for the year 1945, said application being Case No. 3,327 before the Department of Taxation of Ohio. A true copy of the notice sent by the Tax Commissioner to appellant of said final determination is attached hereto as Exhibit "A" hereof and incorporated herein by reference.

The errors in said final determination of the Tax Commissioner herein complained of, are as follows:

1. The Tax Commissioner erred in not granting in its entirety the application filed by appellant for review and redetermination with respect to its 1945 Inter-county personal property tax return on March 12, 1947.

2. The Tax Commissioner erred in failing to eliminate from appellant's 1945 personal property tax assessment towboats and barges, having a true value of $1,322,863.00, and in holding that said boats and barges were taxable in Ohio.

3. The Tax Commissioner erred in including any machinery in process of construction in the assessment of appellant's tangible personal property for 1945.

4. Even if machinery in process of construction were properly includible in appellant's personal property assess- [fol. 199] ment for 1945, the Tax Commissioner erred in not valuing it for such year as idle equipment, at not more than 10% of its cost—that is, at $4,171.60, instead of $41,716.00, for property used in manufacturing; and at $3,893.00, instead of $38,936.00, for property not used in manufacturing.

5. Even if machinery in process of construction were properly includible in appellant's personal property tax assessment for 1945, the Tax Commissioner erred in not valuing it on the average value basis referred to in Section 5386 of the General Code.

6. The Tax Commissioner erred in holding that there is no authority in law or administrative procedure for allowing deductions for the inflated level of general construction costs incident to the war and its aftermath in the valuation for tax purposes of machinery and equipment built during the war years.

7. The Tax Commissioner erred in making an adequate allowance for wholly excessive costs, and for peacetime inutility of equipment constructed for war purposes, in his valuation for tax purposes of appellant's catalytic cracking unit at Cleveland for the tax year 1945.

8. The Tax Commissioner erred in holding that the true value of appellant's Cleveland catalytic cracking unit as of January 1, 1945, was in excess of $3,000,000.00.

9. The Tax Commissioner erred in holding that under the decision of *Willys-Overland Motors, Inc. v. Evatt*, 141 O. S. 402, he did not have discretionary jurisdiction to find a value for appellant's personal property below net depreciated book value.

[fol. 200] 10. The Tax Commissioner erred in holding that the value listed on appellant's return for machinery used in manufacturing in Cuyahoga County was only $561,027.00 in excess of net depreciated book value, whereas in fact the value so listed was $913,448.00 in excess of net depreciated book value.

11. The Tax Commissioner erred in holding that the net depreciated book value shown on appellant's return limited the allowable deduction in the true value of appellant's Cleveland catalytic cracking unit to $561,027.00, whereas in fact the net depreciated book value so shown imposed no limitation in the amount of reduction allowable.

12. The Tax Commissioner erred in failing to reduce the amended true value as of January 1, 1945 of personal property of appellant used in manufacturing in Cleveland, Cuyahoga County, to $6,768,317.00; in failing to reduce the amended true value as of January 1, 1945 of

personal property of appellant not used in manufacturing, in Cleveland, Cuyahoga County, to $611,076.00; and in failing to reduce the amended true values as of January 1, 1945 of personal property of appellant in other taxing districts listed in said final determination at figures excluding the values of property in process of construction in each such taxing district, which values are listed in Schedule 3 attached to appellant's letter to appellee dated October 31, 1947.

13. The Tax Commissioner erred in finding that appellant "failed to list" personal property of any of the types referred to in said final determination, other than property in process of construction which appellant has always contended is not subject to taxation.

[fol. 201] This appeal is on questions of law and fact.

The Standard Oil Company, an Ohio Corporation, by McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett, Its Attorneys, 1500 Midland Building, Cleveland 15, Ohio, Tel: Cherry 2600.

May 12, 1948.

[fol. 202] EXHIBIT "A" TO NOTICE OF APPEAL

Department of Taxation of Ohio

No. 3,327

In the Matter of the Application for Review and Redetermination of THE STANDARD OIL COMPANY, Cleveland, Ohio (Inter-County), for the year 1945

April 14, 1948

The application for review and redetermination of The Standard Oil Company, Cleveland, Ohio, an inter-county corporation, from an increased personal property tax assessment for the year 1945, after being duly heard, came on to be considered.

The Tax Commissioner being fully advised in the premises, finds that for the year 1945 assessment was made increasing the value of both personal property and in-

tangible property over and above that as listed by the applicant as to items and amounts as follows:

Item	*Amount of Increase*
1. Average inventory values	$852,013.00
2. Net taxable credits	1,354,230.00

The Tax Commissioner finds that the average inventory values were increased by reason of the fact that applicant determined the values as listed under the "Life" or, last-in, first-out method, and by reason of such fact the values as listed and returned did not reflect true value and finds that the true value of said inventory for such [fol. 203] year is as reflected in the increased assessment and said assessment as to the values so determined is hereby affirmed.

The Tax Commissioner further finds that the increase in net taxable credits over and above those as returned by said applicant was due principally to the fact that the applicant deducted taxes and annuities in determining the net taxable credits as so listed and finds that the deduction thereof by the applicant was in error and such assessment as to the increase in net taxable credits is hereby affirmed.

The Tax Commissioner further finds that applicant listed watercraft (boats and barges) at the depreciated book values thereof in the amount of $1,017,518 but finds that by reason of excessive reserves having been accumulated the true value of said property was in excess of that as returned and finds that the true value of boats and barges taxable in Ohio for 1945 was $1,322,863.00.

Applicant did not file a claim for deduction with respect to said boats and barges at the time of making return, but in its application for review protested the assessment of said property on the basis that such property was not taxable in Ohio.

The Tax Commissioner finds that watercraft and aircraft belonging to persons residing in this state and not used in business wholly in another state are taxable in Ohio and orders that the true value of boats and barges in the amount of $1,322,863.00 be reflected in the final assessment certificate hereinafter ordered.

The Tax Commissioner being further advised in the premises, finds that personal property of the applicant

other than boats and barges was listed at less than the [fol. 204] true value thereof for the year 1945 in certain taxing districts, partially by reason of excessive reserves having been accumulated and partially by reason of applicant's failure to include in such listing, personal property in the process of construction and finds that the true value of personal property not returned by reason of excessive reserves was $739,022.00 and that $68,157.00 of such amount was personal property used in manufacturing and that $57,865.00 was personal property used other than in manufacturing, and that the true value of personal property in the process of construction and not returned was $41,716.00 for use in manufacturing and $38,936.00 for use other than in manufacturing.

The Tax Commissioner further finds that applicant listed personal property in the amount of $15,052,922.00 which was $561,027.00 more than the net book value thereof and included in such listing in Cleveland district was machinery used in manufacturing consisting of a catalytic cracking unit.

Applicant in its review and redetermination and evidence submitted in support thereof maintains that in the valuation of its catalytic cracking unit the Tax Commissioner should make an allowance for excessive costs and also an allowance for the general inflated level of the cost index during the war emergency and further contends that, by reason thereof the true value of such unit is $3,000,000.00 as of January 1, 1945. Applicant further contends that its boats and barges are not subject to personal property taxation under the Ohio laws.

The Tax Commissioner, being further advised in the premises, and consideration having been given to the claims made and evidence submitted by the applicant in support [fol. 205] of said application for said year, finds that there is no authority in law or in long established administrative procedure for recognizing increased costs due to price increases in the determination of true value of personal property used in business; and that the claim of applicant in this regard should be and hereby is denied.

The Tax Commissioner finds that applicant at the time of filing its return did not file a claim in writing as provided in Section 5389, General Code, with respect to its ma-

chinery and equipment to the effect that the net depreciated book value was in excess of true value.

The Tax Commissioner further finds that the catalytic cracking unit was assessed in excess of the true value thereof in the amount of $988,000.00 by reason of allowable excessive costs and equipment not in use but that in view of the judicial determination (*Willys-Overland Motors, Inc. v. Evatt*, 141 O. S. 402) he is without jurisdiction to find a value below net depreciated book value and orders that the value of such property be reduced in the amount of $561,027.00, being the amount that the machinery and equipment used in manufacturing in Cuyahoga County exceeded the net depreciated book value thereof, and it is ordered that final assessment certificate issue correcting the assessment in the amount so stated. In all other respects the assessment as to machinery and equipment is hereby affirmed and the Tax Commissioner finds that in the districts in which such incorrect listings were made or corrected herein, the true value of personal property used in manufacturing and used other than in manufacturing for such year, including boats and barges, was as follows:

[fol. 206]

USED IN MANUFACTURING		Amended True Values
Allen County	—Shawnee Twp. Sch.	$ 794,961
	—Lima	365
Cuyahoga County	—Cleveland	10,977,441
Lucas County	—Oregon Twp.	3,442,001

USED OTHER THAN IN MANUFACTURING		Amended True Values
Cuyahoga County	—Cleveland	1,328,712
Portage County	—Randolph Twp.	6,306
	—Suffield Twp.	49,338
Summit County	—Franklin Twp. E. Sch.	15,650
	—Franklin Twp. W. Sch.	44,266
	—Green Twp.	34,656
	—Springfield Twp.	15,836
Wayne County	—Chippewa Twp.	18,436
Hancock County	—Washington Twp. Arcadia SD	20,414
Allen County	—Lima	42,502
Belmont County	—Martins Ferry	19,301
Carroll County	—Center Twp. Carrollton SD	211
Cuyahoga County	—Cleveland	635,891
Fayette County	—Washington C. H.	5,867
Gallia County	—Gallipolis	11,701
Hamilton County	—Cincinnati	251,219
Mahoning County	—Youngstown	47,393
Muskingum County	—Zanesville	9,859
Richland County	—Mansfield	27,516
Summit County	—Akron	124,678
Other Counties	—Various	3,243,832

The Tax Commissioner, therefore, orders that final assessment be made for the year 1945 in conformity with and reflecting the findings herein.

Department of Taxation (Sgd.) C. Emory Glander, Tax Commissioner.

(Duly Certified.)

[fol. 207] BEFORE BOARD OF TAX APPEALS

AMENDMENT AND SUPPLEMENT TO NOTICE OF APPEAL—Filed October 18, 1948.

(Personal Property Tax Assessment for 1945)

(No. 14,381.)

The Standard Oil Company, appellant in the above case, hereby supplements the contentions made in its Notice of Appeal filed in the above case with the Board of Tax Appeals, and especially in the second assignment of error therein, by stating that it contends that its boats and barges, having a true value of $1,322,863, should be eliminated from appellant's 1945 personal property tax assessment for the following two reasons:

1. The taxation of such boats and barges by the State of Ohio for the year 1945 would violate the statutes of Ohio, since the use of such boats and barges in waters within or bordering on Ohio was insubstantial; and

2. The taxation of such boats and barges by the State of Ohio for the year 1945, even if permitted by the Ohio statutes, would deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, since such boats and barges had no taxable situs in Ohio for such year.

The Standard Oil Company, an Ohio Corporation, by McAfee, Grossman, Taplin, Hanning, Newcomer and Hazlett, its Attorneys, 1500 Midland Building, Cleveland 15, Ohio, Tel: Cherry 2600.

[fol. 208] BEFORE BOARD OF TAX APPEALS

NOTICE OF APPEAL—Filed May 13, 1948.

(Personal Property Tax Assessment for 1946)

(No. 14,381.)

The Standard Oil Company, appellant herein, hereby gives notice of appeal to the Board of Tax Appeals from the final determination made by the Tax Commissioner of Ohio with respect to the application of appellant for review and redetermination of an increased personal property tax assessment for the year 1946, said application being Case No. 3,276 before the Department of Taxation of Ohio. A true copy of the notice sent by the Tax Commissioner to appellant of said final determination is attached hereto as Exhibit 'A' hereof and incorporated herein by reference.

The errors in said final determination of the Tax Commissioner herein complained of, are as follows:

1. The Tax Commissioner erred in not granting in their entirety the applications filed by appellant for review and redetermination with respect to its 1946 Intercounty personal property tax return on February 5, 1947, and March 12, 1947.

2. The Tax Commissioner erred in holding that there is no authority in law or administrative procedure for allowing deductions for the inflated level of general construction costs incident to the war and its aftermath in the valuation for tax purposes of machinery and equipment built during the war years.

3. The Tax Commissioner erred in making an inadequate allowance for wholly excessive costs, and for peacetime inutility of equipment constructed for war purposes, in [fol. 209] his valuation for tax purposes of appellant's catalytic cracking unit at Cleveland for the tax year 1946.

4. The Tax Commissioner erred in holding that the true value of appellant's Cleveland catalytic cracking unit as of January 1, 1946, was in excess of $3,000,000.00.

5. The Tax Commissioner erred in failing to eliminate from appellant's 1946 personal property tax assessment towboats and barges, having a true value of $1,303,-

907.00, and in holding that said boats and barges were taxable in Ohio.

6. The Commissioner erred in including any machinery in process of construction in the assessment of appellant's tangible personal property for 1946.

7. Even if machinery in process of construction were properly includible in appellant's personal property assessment for 1946, the Tax Commissioner erred in not valuing it for such year as idle equipment, at not more than 10% of its cost—that is, at $92,868.00, instead of $928,686.00.

8. Even if machinery in process of construction were properly includible in appellant's personal property tax assessment for 1946, the Tax Commissioner erred in not valuing it on the average value basis referred to in Section 5386 of the General Code.

9. The Tax Commissioner erred in failing to reduce the amended true value as of January 1, 1946 of personal property of appellant used in manufacturing in Cleveland, Cuyahoga County, to $7,082,711.00; in failing to reduce the amended true value as of January 1, 1946 of personal property of appellant not used in manufactur-
[fol. 210] ing, in Cleveland, Cuyahoga County, to $711,063.00; and in failing to reduce the amended true value as of January 1, 1946 of personal property of appellant in the other taxing districts listed in said final determination at figures excluding the values of property in process of construction in each such taxing district, which values are listed in Schedule 4 attached to appellant's letter to appellee dated October 31, 1947.

10. The Tax Commissioner erred in finding that appellant "failed to list" personal property of any of the types referred to in said final determination, other than property in process of construction which appellant has always contended is not subject to taxation.

This appeal is on questions of law and fact.

The Standard Oil Company, an Ohio Corporation, by McAffee, Grossman, Taplin, Hanning, Newcomer & Hazlett, its Attorneys, 1500 Midland Building, Cleveland 15, Ohio, Tel: CHerry 2600.

May 12, 1948.

[fol. 211] EXHIBIT 'A' TO NOTICE OF APPEAL

Department of Taxation of Ohio

No. 3276

In the matter of the application for review and redetermination of THE STANDARD OIL COMPANY, Cleveland, Ohio (Inter-county) for the year 1946.

April 13, 1948

The application for review and redetermination of The Standard Oil Company, Cleveland, Ohio, an inter-county corporation, from an increased personal property tax assessment for the year 1946, after being duly heard, came on to be considered.

The Tax Commissioner, being fully advised in the premises, finds that as to the year 1946 said applicant filed its return and thereafter increased assessment was made for such year and that such assessment reflected increases over and above those as returned by said applicant in the following respects:

Item	Amount of Increase
1. Average inventory values	$ 935,314.00
2. Net taxable credits	1,567,900.00

The Tax Commissioner finds that the average inventory values were increased by reason of the fact that applicant determined the values as listed under the "Life" or, last-in, first-out method, and by reason of such fact the values as listed and returned did not reflect true value and finds that the true value of said inventory for such year is as reflected in the increased assessment and said assessment as to the values so determined is hereby affirmed.

[fol. 212] The Tax Commissioner further finds that the increase in net taxable credits over and above those as returned by said applicant was due principally to the fact that the applicant deducted taxes and annuities in determining the net taxable credits as so listed and finds that the deduction thereof by the applicant was in error and such assessment as to the increase in net taxable credits is hereby affirmed.

The Tax Commissioner further finds that applicant listed machinery and equipment in Cuyahoga County for the year 1946 in the amount of $4,082,711.00 and that thereafter amended assessment certificate was issued in which the value of the machinery and equipment was increased over and above that as returned in the amount of $6,916,129.00, such increase being due to the failure of the applicant to list machinery and equipment consisting of a catalytic cracking unit; such unit having been fully reserved on the books of the applicant. Applicant also failed to list personal property with a true value of $741,979.00 by reason of excessive reserves having been accumulated and of which $938.00 was used in manufacturing and $163,868.00 was used other than in manufacturing and $577,173.00 was boats and barges. Applicant also failed to list personal property with a true value of $928,686.00 which was in the process of construction of which $904,651.00 was to be used in manufacturing and $24,035.00 was to be used other than in manufacturing.

At the time of filing its return, applicant filed a claim for deduction from book value in words and figures as follows:

[fol. 213]

		Schedule 2
"Cleveland City,	Book Value	$3,142,425.00
Totals	Book Value	3,142,425.00
	Deduction Claimed	—
	Claimed True Value	6,991,741.00

"The depreciated book value figure of $3,142,425 given in Item 1 represents the depreciated book value of the Cleveland Refinery machinery and equipment shown on Schedule 2 of the return and includes the Catalytic Cracker (Houdry unit) at Cleveland at a book value of ZERO, for the reason that the book value of this unit through depreciation (including amortization) was reduced to ZERO by January 1, 1946. Should the depreciated book value of this Houdry Unit be properly deemed higher than ZERO within the meaning of G. C. 5389, then the figure of $3,142,425.00 is to be treated as increased by such excess over ZERO, and the deduction claimed shall be not ZERO, but the

excess of such increased figure over the true value of the refinery personalty of $6,991,741 above mentioned.

"The supporting data with respect to the above claim are already in the possession of the Department of Taxation.

"*Statement Forming Part of the Return*

"In connection with the return to which this is attached we wish to call attention to the fact that the return shows a total true value for the Cleveland Refinery machinery equipment in Schedule 2 of $3,991,741. This amount should be increased by $3,000,000 to reflect and include the true value of the Houdry unit above mentioned, bringing the aggregate true value of Schedule 2 to $6,991,741.00."

Applicant maintains that in the valuation of its catalytic cracking unit the Tax Commissioner should make [fol. 214] an allowance for excessive costs and also an allowance for the general inflated level of the cost index during the war emergency and further contends that by reason thereof the true value of such unit is $3,000,000.00 as of January 1, 1946. Applicant further contends that its boats and barges are not subject to personal property taxation under the laws of Ohio.

The Tax Commissioner, being further advised in the premises, and consideration having been given to the claims made and evidence submitted by the applicant in support of said application for said year, finds that there is no authority in law or in long established administrative procedure for recognizing increased costs due to price increases in the determination of true value of personal property used in business; and that the claim of applicant in this regard should be and hereby is denied.

The Tax Commissioner further finds that in the amended assessment certificate heretofore issued the catalytic cracking unit was assessed in excess of the true value thereof in the amount of $932,360.00 by reason of allowable excessive costs and equipment not in use and finds that the true value of said catalytic cracking unit as of January 1, 1946 was $5,983,769.00 and further finds that boats and barges were properly assessed as having a taxable

situs in Ohio and likewise finds that there was no error in the assessment of the personal property which taxpayer failed to list by reason of excessive reserves having been accumulated and further finds that there was no error in the assessment of personal property in the process of construction and the assessment as heretofore made as to such property is hereby affirmed.

[fol. 215] In view of the foregoing, the Tax Commissioner finds that in the districts in which such incorrect listings were made, the true value of personal property used in manufacturing and used other than in manufacturing for such year, including boats and barges, is set forth as to amounts in the districts in the schedule below:

USED IN MANUFACTURING		Amended True Values
Allen County	—Shawnee Twp. Shawnee RSD	$ 778,163
Cuyahoga County	—Cleveland	10,960,267
Lucas County	—Oregon Twp.	3,226,760

USED OTHER THAN IN MANUFACTURING		Amended True Values
Cuyahoga County	—Cleveland	$ 1,334,493
Portage County	—Randolph Twp.	5,701
	—Suffield Twp.	44,883
Summit County	—Franklin Twp. E. Sch.	14,301
	—Franklin Twp. W. Sch.	43,859
	—Green Twp.	31,478
	—Springfield Twp.	14,169
Wayne County	—Chippewa Twp.	16,618
Hancock County	—Washington Twp. Arcadia R.S.D.	49,013
Cuyahoga County	—Cleveland	670,989
	—Brecksville	5,803
	—Euclid	11,049
	—Chagrin Falls	5,607
Defiance County	—Defiance	3,040
	—Hicksville	3,792
Fairfield County	—Lancaster	7,741
Franklin County	—Columbus	112,936
Fulton County	—Wauseon	3,003
	—Fayette	2,722
Geauga County	—Chardon	3,307
Hamilton County	—Cincinnati	239,683
Henry County	—Napoleon	3,839
Jefferson County	—Steubenville	15,477
Lake County	—Painesville	8,118
Lawrence County	—Ironton	6,732
Lucas County	—Maumee	6,273
	—Toledo	161,704
Ross County	—Chillicothe	8,715
Scioto County	—Portsmouth	64,615
Summit County	—Akron	114,858
Williams County	—Bryan	4,381
Wood County	—Grand Rapids	4,666

The Tax Commissioner further finds that in all other respects the assessment as heretofore made is correct [fol. 216] and it is ordered that final assessment certificates issue reflecting the above findings.

Department of Taxation (Sgd.) C. Emory Glander, Tax Commissioner.

(Duly certified.)

[fol. 217-225] BEFORE BOARD OF TAX APPEALS

AMENDMENT AND SUPPLEMENT TO NOTICE OF APPEAL—(Filed October 18, 1948)

(Personal Property Tax Assessment for 1946)

(No. 14,381)

The Standard Oil Company, appellant in the above case, hereby supplements the contentions made in its Notice of Appeal filed in the above case with the Board of Tax Appeals, and especially in the fifth assignment of error therein, by stating that it contends that its boats and barges, having a true value of $1,303,907, should be eliminated from appellant's 1946 personal property tax assessment for the following two reasons:

1. The taxation of such boats and barges by the State of Ohio for the year 1946 would violate the statutes of Ohio, since the use of such boats and barges in waters within or bordering on Ohio was insubstantial; and

2. The taxation of such boats and barges by the State of Ohio for the year 1946, even if permitted by the Ohio statutes, would deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, since such boats and barges had no taxable situs in Ohio for such year.

The Standard Oil Company, an Ohio Corporation, by McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett, its Attorneys, 1500 Midland Building, Cleveland 15, Ohio, Tel: Cherry 2600.

[fol. 226] BEFORE BOARD OF TAX APPEALS

PROCEEDINGS AND TESTIMONY

(Nos. 12,488, 14,381 and 14,514.)

Taken before William J. Ford, Examiner, Board of Tax Appeals, in their hearing room, State Office Building, Columbus, Ohio, on October 18th, 1948.

APPEARANCES:

Mr. Isador Grossman and Mr. Rufus S. Day, Jr., on behalf of the appellant; Honorable Hugh S. Jenkins, Attorney General, by Mr. Darronne Tate, Assistant Attorney General, on behalf of the appellee.

Monday Morning Session, October 18th 1948.

Mr. Ford: Before the Board of Tax Appeals, Department of Taxation of Ohio, Standard Oil Company, Cleveland, Ohio, appellant against C. Emory Glander, Tax Commissioner of Ohio, Case No. 12,488. Appeal filed herein under date of January 29th, 1947, from an order of the Tax Commissioner under date of December 30th, 1946, making a final determination and certification with respect to appellant inter-county personal property tax returns for the tax year 1943 and '44, and with respect to the final assessments of appellant's personal property for said tax year.

Standard Oil Company, Cleveland, Ohio, against C. Emory Glander, Tax Commissioner of Ohio, Case No. 14,381. There are two appeals in this case, (1) appeal filed herein under date of May 13th, 1948, from a final order of the Tax Commissioner, under date of April 14th, 1948, acting upon an application for review and rede-[fol. 227] termination theretofore filed by the appellant, as an inter-county corporation with respect to an increased personal property tax assessment made against the appellant for the tax year 1945. (2) Appeal filed herein under date of May 13th, 1948, from a final order of the Tax Commissioner, under date of April 13th, 1948, acting upon an application for review and redetermination of the appellant, as an inter-county corporation, with re-

spect to increased personal property tax assessment made against the appellant for the tax year 1946.

The Standard Oil Company, Cleveland, Ohio, appellant, against C. Emory Glander, Tax Commissioner of Ohio, appellee, Case No. 14,514. Appeal filed by the Standard Oil Company, appellant herein, from a purported final assessment certificate of valuation for the tax year 1945, issued by the Tax Commissioner on May 19th, 1948, with respect to the tangible personal property of the appellant in Cuyahoga County, Ohio.

Cases heard before William J. Ford, Examiner, at the hearing room of the Board, Columbus, Ohio, October 18th, 1948.

Counsel for the appellant will enter their appearances by name and by office address.

Mr. Grossman: Isador Grossman and Rufus S. Day, Jr., 1500 Midland Building, Cleveland.

Mr. Ford: You may enter your appearance, Mr. Tate.

Mr. Tate: Hugh S. Jenkins, Columbus, Attorney General, Darrone R. Tate, Assistant Attorney General, representing the Tax Commission.

Mr. Ford: Mr. Day, you may state in the record the agreement of counsel with respect to the consolidation of these cases.

[fols. 228-231] Mr. Day: I may state that it is agreed between counsel in this case that the three cases above referred to are consolidated and that all evidence introduced on this hearing be regarded as introduced on all three cases, is that satisfactory, Mr. Tate?

Mr. Tate: Insofar as is pertinent thereto.

Mr. Day: Insofar as it is pertinent thereto.

Mr. Tate: It may be so agreed on behalf of the Tax Commissioner.

Mr. Ford: You may proceed.

Mr. Day: Now, it seems to me that since these three cases all contain some common issues that it might clarify things for me to make a brief statement as to what is involved in the three cases, and after that I will state in what order I intend to proceed.

[fol. 232] Now, the second issue for 1945 and '46 is the taxability in Ohio, under the statute and under the Con-

stitution, of the boats and barges owned by the Standard Oil Company.

Mr. Ford: Is that with respect to all of the tax years?

Mr. Day: 1945 and '46 only, with respect to the boats and barges, owned by the Standard Oil Company, and used on the Ohio River system.

In that connection, we have two contentions on the boats and barges. The first is that while there is no question they were owned by an Ohio company, that nevertheless, their use in waters adjacent to Ohio was so insubstantial that they should not be regarded as taxable in Ohio under the statute.

The second contention is that even if they are regarded as taxable in Ohio, under the statute, nevertheless their taxability at their full value in Ohio would be a deprivation of the company property without due process of law, under the Fourteenth Amendment of the United States Constitution, because there is no jurisdiction to tax in Ohio.

As a second contention, now I want to say that we made those contentions orally before the Tax Commission, but here at this time, since we first have a quasi judicial tribunal that is authorized to pass upon a constitutional contention, I wish to file a supplement to our notice to appeal, which states these two contentions, for the purpose of the record, so that they will be clearly before the Board.

Mr. Ford: Any objection to the proposed amendment? [fol. 233] Mr. Tate: Let me look at the amendment first.

Mr. Day: I have three documents here because one is for the 1945 part of the first appeal, one for the 1946 part of the first appeal, and the second for the last appeal.

Mr. Tate: Let me ask counsel, for the purpose of the record, if I understand that this is merely an elaboration of the former plaintiff assignment of error.

Mr. Day: That's right.

Mr. Tate: Under those circumstances, there is no objection to the filing of the supplement to the notice of appeal.

Mr. Day: Let me state to Mr. Tate in detail.

Mr. Ford: Is that a supplement or an amendment?

Mr. Day: It is a supplement. In our original assignment

of errors, in these cases, we merely stated that these boats and barges were not taxable in Ohio. We doubted the right of the Tax Commissioner to pass upon the constitutional question. Now, for that reason, now, that we are before a quasi judicial tribunal that has a right to pass upon that type of question, we wish to file a supplement to the assignment of error, which states that we have both a statutory ground and a constitutional ground for our contention relating to the boats and barges.

(Discussion had off the record.)

Mr Ford: Upon request of counsel for the appellant, and without objection, appellant is given leave to file an amendment and supplement to its notice of appeal in case No. 14,381, with respect to the personal property tax assessment of the appellant for the tax year 1945. Upon application of counsel for the appellant, and without [fols. 234-236] objection, the appellant is given leave to file an amendment and supplement to its notice of appeal in Case No. 14,381, with respect to the personal property tax assessment against it for the tax year 1946.

[fol. 237] Mr. Day: On the question on the issue of boats and barges, it might be helpful for me to indicate very briefly why this issue is being raised in this way at this time. I am not going into detail on it, but I think there may be some factors here that may be of interest to the Board.

Mr. Ford: Very Well.

Mr. Day: For a long time we raised no issue of the taxability of boats and barges in Ohio, but because in earlier years most of our boats were product boats which [fol. 238] moved mainly in waters adjacent to Ohio. We had very few boats in earlier years too, and because no other state was trying to tax our boats and barges. Under the decisions of the United States Supreme Court, with respect to jurisdiction to tax, it used to be pretty clear and so far as decisions on boats and barges are concerned, it still seems to be the case that the state of the domicile of the owner has jurisdiction to tax the full value of boats owned by that owner, and that no other state has any jurisdiction to tax the boats, regardless of where they are, unless the boats are, can be kept here, located entirely in a single state. Now, for

many years that was the law of the United States Supreme Court, and it wasn't challenged. In recent years, with some changes in the doctrine of the United States Supreme Court on jurisdiction to tax other things than boats, some of the states along the river had been contending that they ought to be able to tax a proportionate part of the value of any boats and barges, whereever owned, that go along their river shore line, proportionate, usually, to the number of miles of route that are along those shore lines as compared with the number of miles of route, of total shore line. Some of them instead of taking miles, say barrel miles, in other words, how many barrels moved over how many miles, when it comes to petroleum boats. A couple years ago the state of Kentucky started contending that our boats should be taxable by Kentucky on that sort of proportionate basis, even though we had paid a full tax to Ohio on those boats.

Now, for these years, 1945 and '46, we paid a full tax to Ohio for these boats and what we have in this case is that even though we paid tax on them, listed them, and paid tax on them, they should be excluded from the assessment. [fol. 239] On that point the fact of filing no 902 claim with respect to our 1945 assessments makes no difference, because we are not claiming a reduction in book value of boats and barges for any year. The parties are in agreement on the value of boats and barges, the question merely is, are they taxable in Ohio. We have paid a full tax to Ohio on boats and barges, but when Kentucky began trying to tax us on a pro rated basis, I may say those proceedings are not finished yet, and Louisiana started to attempt to tax other companies' boats and barges on a pro rative basis, they haven't gotten to us yet, but probably will, so in view of those things, we decided that we should appeal from the inclusion of the boats and barges in the Ohio assessment for these two years as against the possibility that the other states on the river might also succeed in taxing us for those years, so that we will have an appeal pending both from the Ohio assessment and the assessment of the river states, so that if necessary we can carry both cases to the United States Supreme Court and contend that certainly we only ought to be able to be taxed once on our boats and barges for one year, and not a total of twice.

Now, that was our fundamental reason for raising the issue of boats and barges for the years 1945 and '46, for the first time, even though we had reported them in our return and paid a tax on them.

Now, I may say that the true value of boats and barges including in our 1945 assessment, that is of January 1st, 1945, as $1,322,863, of course, the assessed value would be 70% of that, because boats and barges are listed at 70% of their true value, for 1946, the true value of boats and barges included in our assessment is $1,203,907. The [fol. 240] assessed value would be 70% of that, just as in the case of 1945, and as I said before our two contentions with respect to these boats and barges are first, statutory, second, constitutional. The statute in point is Section 5325 of the General Code, which provides that the term "personal property for tax purposes shall include every ship, vessel, boat, of whatever name or description used or designed to be used either exclusively or partially in navigating any of the waters within or bordered on this state." Now, on that point we expect the evidence to show that any use of the boats and barges here involved in the years in question in waters adjacent to Ohio was so insubstantial as to be negligible, that it shouldn't be taken into consideration for the purpose of rendering the boats taxable under this statute.

With respect to the constitutional point, our point is that, and the contention we are making is that jurisdiction to tax is lodged in the state in which these boats operate, not in Ohio, which is merely the state of the domicile and in which only an insubstantial part of the operation takes place. That, of course, is based upon the due process clause of the Fourteenth Amendment of the United States Constitution.

Now, let me say again there that our contention is contrary to the present decision of the United States Supreme Court with respect to boats and barges. We are making it, as I said, because we feel that in a case that is now pending in the United States Supreme Court, the United States Supreme Court may hold that jurisdiction to tax resides not in the domicile of the boat owner, but in the state in which it operates upon a prorative basis. Now, I may also say in order to have no charge made of

[fol. 241] undue inconsistency in the Kentucky case we will be contending the other way, because what we are trying to do is to protect ourselves against being taxed twice for these years. Mr. Grossman points out the Kentucky authorities are contending that they have a right to go back several years and pick up back years. Now, with that preliminary statement, I would like to call our witness on this subject, Mr. Pattison.

And also: Henry William Pattison, called as a witness, being first duly sworn, testified as follows:

Examined by Mr. Day.

Q. Will you state your full name, please?
A. Henry William Pattison.
Q. Where do you live?
A. Cleveland, Ohio.
Q. Now, whom are you employed by, Mr. Pattison?
A. By the Standard Oil Company of Ohio.

Mr. Ford: How do you spell your name?
Mr. Pattison: P-a-t-t-i-s-o-n.

Q. How long have you been with the Standard Oil?
A. Since the spring of the year, 1946.
Q. In what capacity are you enployed by the Standard at the present time?
A. As a staff assistant to the vice-president in charge of our transportation operations.
Q. Have you been in that position ever since you went with the company?
A. Yes, I have, sir.
Q. Does the transportation operation of the company, of which your department is associated, include the boats and barges of the company?
A. They do include the boats and barges.
[fol. 242] Q. Are you familiar with the operations and routes of the boats and barges of the company and with the records pertaining thereto?
A. I am familiar with the operations and with the records.
Q. Am I right in assuming that your company has two

classes of boats and barges, one dealing with crude oil operations and one with gasoline operations?

A. That is correct.

Q. Would you tell the Board in general what was the nature of the company's operations on its crude oil boats and barges during the years 1944 and '45?

A. The most substantial of the crude that had to be moved in those years on the river was crude that was made available to us at Memphis, Tennessee, and at Gibson Landing, which is on a little further south of Memphis, and those crudes in question had to be moved to principally two points of destination, one of them our refinery located at Bromley, which is just across the river from Cincinnati.

Q. How do you spell that?

A. B-r-o-m-l-e-y, which is just across the river from Cincinnati, four miles west, and to Mount Vernon, Indiana, which is the river terminus of our pipeline operations. And those movements from lower river point to Mount Vernon, Indiana, and to Bromley, Kentucky, represents the greatest bulk of the movements on the river in 1944 and '45. There are other movements, but they don't represent much, this represents the substantial volume that was handled.

Q. When you say lower river point, what do you mean?

A. In our overall picture there is crude made available to our company on various points on the river, so that our boats and barges can pick up and move to a pipeline with [fol. 243] an ultimate destination like Bromley through exchange arrangement with other companies, or in case of some of the major fields, for example, in Mississippi, we have a major source of crude, we have to make it available in river points, in the years in question it was Memphis, moved from the Pensley Field in Mississippi to Memphis by tank cars, and from Memphis on the river by boat, either to ultimate destinations of Mount Vernon, Indiana, or to Bromley, Kentucky. In other words, these lower river points in some instances we have our own crude, some instances we have crude which we get by reason of exchanges with other companies, that is from the termini of other major oil companies, I mentioned Gibson Landing.

Q. What state?

A. Louisiana, Gibson Landing being the terminus of Standard Oil of New Jersey, Buckhorne Landing was used by us at that time, being the pipeline terminus at that time of Sun Oil Company. Other points mentioned down there, Monroe, Aimsville, and so forth, are all river termini.

Q. Are those in Louisiana?

A. Louisiana, being river termini of other oil producers, which are making crude available to the river for distribution wherever it might go.

Mr. Day: Please mark this Appellant's Exhibit No. 1.

(And thereupon the paper last above referred to was marked for purposes of identification as Appellant's Exhibit No. 1 by the reporter.)

Q. Mr. Pattison, I hand you Appellant's Exhibit No. 1, and ask you what it is and what it shows?

[fol. 244] A. Exhibit 1 shows the miles of river, major middlewest river transportation facilities of water deep enough to handle tow boats and barges, the kind we operate, principally the Mississippi and Ohio Rivers, and we have indicated on here the principal river terminal by name, also shown on here is the mileage as represented in terms of so many miles below Pittsburgh, being the number zero mileage on the river for purposes of identification and we have indicated in red the Mississippi and Ohio Rivers are those rivers used by our tow boats and barges for the movement of crude oil, with one exception, as you notice that the river is colored red as far as or approximately Cincinnati, the Bromley area. We had in 1944 occasion to carry one movement, one of the crude movements to Catlettsburg, which I don't know that this map shows, it is about midway between Indiana and Pennsylvania, on the Ohio River, about half of the overall Ohio River mileage.

Q. There was one movement in that year?

A. One movement in that year with that.

Q. Catlettsburg is in Kentucky?

A. Catlettsburg is in Kentucky, the Ashland Oil and Refinery Company. With that exception, as I mentioned before, the movements are principally confined from some

of these lower river points in Louisiana, Arkansas, for example, Gibson Landing, Memphis, on up to the "Y" at the junction of the Mississippi and Ohio Rivers, from those points on east and north to Mount Vernon, Indiana. Mount Vernon is on the river at the junction of the Illinois and Indiana line, that being our principal pipeline connection and on further east and north to Bromley, Kentucky, and the location of the LaTonia Refinery.

[fol. 245] Q. Now, Mr. Pattison, then does this red line on your map indicate that the southernmost point of your operation of your boats and barges on the Ohio, Mississippi system was a place in Louisiana near Baton Rouge?

A. That's right, I think that perhaps more important is the fact that the greatest bulk of the movement, most southernly point of the greatest bulk of the movement was Gibson Landing and with the exception of the isolated movement further south, and no further north than Bromley.

Q. Now, the northernmost point of your movement of your crude oil boats and barges, except for the one trip to Catlettsburg, which you mentioned in 1944, was Bromley?

A. Bromley, that's right, sir.

Q. And Bromley, which is in Kentucky, is at the top end of this red line, is it not?

A. That's right, sir.

Q. Do you know, Mr. Pattison, what boat it was that made the trip up to Catlettsburg in 1944?

A. I will have to check my notes, I believe either the Atlas or Renown.

Q. Will you check that, please?

A. The steamer Renown, yes.

Q. It was the steamer Renown?

A. Yes.

Q. Does the company still own the steamer Renown?

A. No, the steamer Atlas and steamer Renown, the two vessels were considered highly inefficient and they were very much so, we had to use them during the war, we didn't have anything else, and they were disposed of as soon as we were able to get equipment, either additional

tows purchased by our company or were able to lease more efficient facilities from someone else.

Q. Do you know when they were disposed of by the company?

A. I think the latter part of 1944, I don't remember the exact date.

[fol. 246] Q. Mr. Pattison, does all of the crude oil that is moved by your boats and barges on this river system go as far as Bromley?

A. No, not by a long shot. I'd say perhaps the greatest majority only goes as far as Mount Vernon, Indiana, into the pipeline terminus. The per cent I would have to check my figures, perhaps as much as 40% goes to the destination of Mount Vernon.

Q. Now, you say Mount Vernon, you mean Indiana?

A. Mount Vernon which is located on the river roughly at the junction between the boundary lines of the states of Illinois and Indiana.

Q. Do you have a pipeline from Mount Vernon to your Ohio refinery?

A. We have a pipeline which begins at Mount Vernon termini and which runs north for a distance of thirty or forty miles, at which time it joins the pipeline of the Ohio Oil Company. The crude oil moves into the pipeline of the Ohio Oil Company up to a point called Stowe, Illinois, at which point it moves into the line of the Sohio Pipeline Company which is a subsidiary of the Standard Oil of Ohio, moves from the lines of the Sohio Pipeline by one of two means, either one line to Lima, Ohio, or to another line over to Mantua, Ohio, which is close to Cleveland, and on those movements that go through the line to Lima, Ohio, they join the junction with the Buckeye Pipeline for movement on to Cleveland or to Toledo.

Q. Are the routes of those pipelines also shown on the map?

A. They are also shown, on the map, the route of the pipelines.

Q. Do I understand that a good part or most of the oil that comes up the river at Mount Vernon, Indiana, goes up to those pipelines?

A. That is correct, sir.

[fol. 247] Q. Then, Mr. Pattison, you have stated that in the year 1944, up to a date in the latter part of that year, when you disposed of them, you had two boats named the Atlas and the Renown, what other boats did you have operating in crude oil service on the Ohio River and Mississippi River during these years 1944 and 1945?

A. We had two motor vessels or Diesel vessels, as we call them, our biggest one and most efficient tow boat being Sohioan and the second boat, somewhat smaller capacity, a tow boat, the Sohio-Memphis, and then we also had two of the so-called Defense Plant Corporation boats which were built, twenty odd boats were built during the war, which were leased to major operators, two of them we were using at that time, formerly the BouArada, now called the steamer Sohio Fleetwing, and the Coral Sea, steamers, 2000 horsepower steamboats built by the Defense Plant Corporation and leased to the various major companies on the rivers for hauling. We used some of those during the war and later when they were put up for sale we acquired two of them.

Q. Now, have you named all of the boats that the company had in crude oil service in the years 1944 and 1945?

A. The two steamers, the Coral Sea, and the Sohio Fleetwing or formerly the BouArada, the two motor vessels, the Sohioan, and the Sohio-Memphis, and the ones we mentioned, the Atlas and the Renown, that was disposed of in 1944.

Q. Except for the Atlas and the Renown, were these boats all owned by the company during the entire year 1944 and '45?

A. No, they were not. The only ones entirely owned by the company in 1944 and '45 were the two boats, the Sohioan and Sohio-Memphis, plus the Atlas and the Renown, [fol. 248] and the other two boats, steamers from the Defense Plant Corporation, which were leased to the various companies. We also leased these boats.

Q. When were those boats acquired, when was the ownership of those boats acquired by your company as distinguished from the leasing of those two boats?

A. The two, the 2000 horsepower steamers, were acquired, the one I would have to check the exact date, I am not posi-

tive, perhaps Bill can answer that question, the steamer, the Sohio Southern or the former Midway Island was acquired in 1946, if my memory is correct.

Q. I am limiting it to the boats owned in 1944 and '45, the Coral Sea?

A. The Coral Sea, I believe, was acquired in 1945, I will have to check that.

Mr. Ford: In that connection, there is no question here with respect to identity or valuation of the boats and barges owned by the appellant company on taxing day in 1945 and taxing day 1946, but that whole question is one of jurisdiction.

Mr. Grossman: One of jurisdiction and one of the interpretation of the Ohio statute.

Mr. Ford: Yes, Mr. Day did say that too.

Mr. Day: There are two somewhat claritory questions I would like to ask.

Q. You said a little while ago that certain boats were the only ones entirely owned during the year, did you mean by that these were the ones that were owned the whole of those years, or did you mean there were some other boats which you had a part interest in during these years?

A. No, I obviously confused everybody, I mean to say that when we lease a boat from either the Defense Plant Corporation or from some independent operator on a so-called bare boat basis, it is the practice of the industry [fol. 249] that the operator supplies the crudes and provisions and fuel, and take over, it operates 100%, so in a sense I confused you, we look at that as almost in the sense of ownership, perhaps, and actually operate the boats and pay rent all for the use of that. In that category are the two boats, the BouArada and the Coral Sea. We don't own them, the Defense Plant Corporation owns them.

Q. When did you acquire them?

A. Mr. Kall tells me the purchase was made on the one December, 1945, and the other in June, 1946.

Q. Which is which?

A. The Sohio Southern or Midway Island was acquired in 1946 and the BouArada or presently called Sohio Fleetwing was acquired in December, 1945. Those dates Mr. Kall has told me.

Q. The M. V. Sohio was owned by the company during the entirety of those years?

A. That is correct, that's right.

Q. Is that true of any other boat?

A. That is true of the Sohio-Memphis.

Q. And the Atlas and Renown were owned by the company but were sold by the company some time during 1944, is that right?

A. That is correct.

Q. Can you tell us the approximate date in the case of both boats?

A. I had shown on these sheets the record had indicated that it was in October, 1944.

Q. Both boats were sold?

A. Yes.

Q. Now, are there any other boats in crude oil service in the years 1944 and '45, which the company owned?

A. Yes, there was one very small one, the Sohio Mount Vernon, I believe we called it at that time, which was a little 200 horse power terminal boat just used for pushing barges around, and spotting them in their berths, and [fol. 250] so forth, for loading and unloading, is all. That is all that were in crude service.

Q. Mr. Pattison, are there any other boats which during either of these years, 1944 or '45 the company had a part interest in as distinguished from complete ownership?

A. No boats that I know of that the company had a part interest in. There was a product boat, the Sohio, we haven't discussed it, the Atlas and Renown were totally and completely owned by Standard and the Sohio-Memphis, the balance have been leased to us.

Mr. Day: Please mark this Appellant's Exhibit No. 2.

(And thereupon the paper last above referred to was marked for the purpose of identification Appellant's Exhibit No. 2 by the reporter.)

Mr. Day: I think perhaps before going any further, we will offer into evidence Appellant's Exhibit No. 1.

Mr. Tate: No objection.

Mr. Ford: Upon request of counsel for the appellant,

Appellant's Exhibit No. 1 offered in evidence and received.

(And thereupon Appellant's Exhibit No. 1 was offered and admitted in evidence.)

Q. Mr. Pattison: I hand you Appellant's Exhibit No. 2, was this exhibit prepared by you?

A. This exhibit was prepared by me.

[fol. 251] Q. Would you tell the board in detail what the exhibit shows?

A. I will be glad to. We have attempted to list here during each of the years in question, 1944 and '45, all of the movements in terms of barrels and barrel miles, which is commonly used by industry, which were accomplished by the individual boats, either under our ownership or under our control during those years. For example, look at the top line in the year 1944, we moved from Cairo, now Cairo is at the junction of the Ohio and Mississippi River to Mount Vernon, Indiana, which is our pipeline terminus, a movement of 151 miles, under the steamer Atlas delivered 6083 barrels, reading from left to right again. Take the first line, for example, the movement from Cairo, Illinois, to Mount Vernon, Indiana, Cairo, Illinois, being located here at the junction of the Mississippi and the Ohio Rivers is called the first point on your map or the Y, at an actual distance of 151 miles movement from the junction of the river to the boundary line from the Illinois and on the river, you see a terminal called Mount Vernon, following that across we have three columns listed under each tow boat, take the steamer Atlas, for instance, shows barrels from Cairo, Illinois, to Mount Vernon, Indiana, 6083 miles in terms of barrels, times the miles, the total barrel miles is the second amount, the Ohio is zero, and go down the second one, that is more appropriate, Gibson Landing, second line, which is way down here in Louisiana, to Bromley, Kentucky, which is right across the river from Cincinnati, being an actual 1192 miles, 17½ miles operated in Ohio.

Q. Let me ask you, if I may interrupt to ask a question, Mr. Pattison, will you tell us, when you talk of operated in Ohio, and refer to your table to operated in [fol. 252] Ohio waters, what do you mean?

A. I mean that the tow boat moved in waters on the Ohio River adjacent to the state of Ohio, from the distance from Indiana to Ohio boundary line to Bromley. It operated on the Ohio River from the boundary line of the Ohio and Indiana up so far as Bromley.

Q. That was 17½ miles?

A. 17½ miles.

Mr. Ford: Please read that answer back.

(Answer read.)

Q. Now, Bromley is in Kentucky?

A. Bromley is in Kentucky.

Mr. Ford: What was the occasion of getting over on the Ohio waters at all?

The Witness: There isn't any occasion to get into the Ohio waters, what I meant to say, the boat is moving on the Ohio River between the states of Ohio and Kentucky from the boundary line of Indiana and Ohio to Bromley, Kentucky.

Mr. Day: In other words, Mr. Ford, I want to clarify the ambiguity in the term on the chart with reference to Ohio waters. In other words, that merely means on this chart movement in a part of the Ohio River that is along Ohio.

Mr. Ford: As between Ohio and some other state?

The Witness: No, between Kentucky, well, the movement is from a place down the river up to Bromley, Kentucky.

Mr. Ford: Yes, through a part of the river that is between the Ohio shore and the Kentucky shore, is that correct, Mr. Pattison?

The Witness: That is correct.

Mr. Day: As Mr. Grossman is stating, the reference to Ohio waters then is not referring to waters that are [fol. 253] legally within the boundary limits of the state of Ohio, as I understand the state of Ohio begins only on the low water mark on the Ohio side? The only reference is to waters of the Ohio River and a place which is between an Ohio shore and a Kentucky shore.

Mr. Ford: Is that the way the witness understands it?

The Witness: That is the way I understand it.

Mr. Ford: We will recess at this time for the noon hour, and we will come back at 1:30.

(And thereupon a recess was had until 1:30 of same day.)

Monday Afternoon Session, October 18th, 1948.

Mr. Ford: You may proceed with the witness.

And also: Henry William Pattison, being recalled testified as follows:

Examined by Mr. Day.

Mr. Day: Before returning to this, Appellant's Exhibit No. 2, I want to make one remark which may clarify things and I want to ask one other question. The remark is this, that the reason we have been talking here about the use of these boats and barges included all service in the years 1944 and '45 is that we are dealing with the value as of January 1st, 1944, and January 1st, 1945.

Mr. Ford: That's right.

Mr. Day: And the taxability presumably depends upon the use in the years that end, because using the year that follows then is not known at that time.

Mr. Ford: It is so understood.

Mr. Day: Very well.

[fol. 254] Q. Mr. Pattison why do these boats and barges include oil service used in waters adjacent to Ohio at all?

A. Well, there are only two ways to get crude oil to our LaTonia Refinery.

Mr. Ford: What refinery?

The Witness: LaTonia Refinery is in the Cincinnati area on the Kentucky side, close to Bromley. Bromley is the pipeline terminus at the river. The river terminal, there are only two ways to get to the LaTonia Refinery, one by river, and the other by pipeline, through a pipe owned by the Ohio Oil Company. It has always been a matter of economics with us for the manner selected of getting the crude to the refinery, delivered to the refinery. The delivery is the most important criterion with the exception of certain times during the war, you had to do certain things when you had no other choice, but during these

years we were using the river fleet equipment on the river to deliver crude to the refinery through the Bromley terminal by boat and barge, not by pipeline, principally dictated by economics..

Q. Was that the only reason during these years 1944 and '45 why you moved these boats and barges into the part of the Ohio River adjacent to Ohio?

A. To the best of my knowledge, that is the only reason.

Q. How far is it from the Ohio border to Bromley, which is the port for your LaTonia Refinery?

A. I don't have any official coast guard mileages to give you, the best I could get was an estimate from maps that we had available as to the distance, and my estimate was 17½ miles, it is very close to it, maybe 17 3/4 or 17.4, something of that kind.

Q. In addition to the refinery in LaTonia and in Kentucky your companies had certain other refineries?

A. Have refineries.

[fol. 255] Q. Where are they located?

A. Lima and Toledo, and at Cleveland, Ohio.

Q. Is crude oil that is destined to those refineries shipped up the river too?

A. No, there is no way to ship it up the river, I should say there are no connections, no pipeline connections with the river in the Ohio area. Therefore, we have to get crude to the Lima refinery and Toledo refinery through those pipelines which connect with the river. Now, our principal connection, as I mentioned before, is Mount Vernon, Indiana, we really had two alternatives, we have Wood River, I don't have a map to show you, the principal pipeline connects with the river, and our refineries through Wood River, which is St. Louis.

Q. Wood River, what state?

A. Missouri there is a connection that the Ohio Oil Company has, a pipeline connects between St. Louis and Lima, Ohio. We can move crude up to Lima and then through the Buckeye line to Cleveland and Toledo, or we have the other alternative of coming by river up the Mississippi to our Mount Vernon river landing, and moving into our pipelines at either Cleveland or Toledo.

Q. Do you have any pipeline connections with your Ohio refineries that connect with the river in Ohio?

A. We do not.

Q. They are all further south and west than Ohio?

A. We should qualify that a little bit, we do have some pipeline connections in Ohio, not crude, we do have some product lines.

Q. But these boats and barges in crude oil service bring nothing to go into those pipelines?

A. That's right, sir.

[fol. 256] Q. Aside from the operation in the 17½ miles of the Ohio River to get to Bromley and the LaTonia Refinery, did your boats and barges in crude oil service in the years 1944 and '45 operate in any other waters that were either in Ohio or adjacent to Ohio?

A. With the exception of the one isolated movement, which I mentioned to the Ashland Oil and Refinery Company at Catlettsburg Refinery, there was no exception to that, everything else went to Bromley. That is the ultimate destination being LaTonia.

Q. That was one made by the Renown?

A. Made by the Renown, and the Renown was sold in the fall of 1944.

Q. Now, to return to Appellant's Exhibit No. 2, would you proceed with your explanation of what this shows?

A. Well, let's take the second line here, the second line is designated Bromley movement from Gibson Landing to Bromley, Kentucky, which is a distance of 1,192 miles 17.5 miles of which is waters between the state of Ohio and Kentucky, from the Ohio, Indiana line to Bromley. You can see the first column is the steamer Atlas, she did not make any movement, you have to get over to the M. V. Sohioan, 92,760 barrels were delivered during that year at Bromley from Gibson Landing, multiply that number of barrels times mileage and we have a barrel mileage of 1,105,699 and the barrel miles in waters adjacent to Ohio of 17½ miles is 16,233, and similarly we can go across the line to the Sohio-Memphis, which delivered on that particular movement, and the Fleetwing and so forth, and then the last column on the page would be a summary total of all the boats, the total number of barrels would be 375,000

[fol. 257] barrels were delivered to Bromley, Kentucky, from Gibson Landing, or a total barrel miles of 4,471,310. Any question about that?

Q. Mr. Pattison, does this chart, Exhibit No. 2 show all of your movements from the years 1944, '45 and '46 of crude oil boats and barges?

A. There may be some confusion, when you say all of the movements, you take for example this line that we just looked at, Gibson Landing to Bromley, these figures don't indicate all made in one trip, that was made in more than than one trip.

Mr. Ford: We understand that.

The Witness: This 92,760 barrels, that happened to be one, the Memphis delivered 162,044 barrels, probably that was three trips.

Q. At least it shows a summary of the operations?

A. A summary of the operations that were made during that year, the total number of barrels delivered to each destination.

Q. For each of the three years?

A. For each of the three years. It does not indicate the number of trips for each boat.

Q. Does it also include all of the boats that you had operating in this service?

A. Includes all of the boats operating in that service.

Q. Are the facts and figures stated on this chart, Exhibit No. 2, accurate?

A. To the best of my ability, they are accurate figures as taken from the records of the company.

Q. Now, I note on Exhibit No. 2——

Mr. Ford: In connection, in response to a question of Mr. Tate, I believe, did you prepare them yourself from the records of the company, or were they prepared under your supervision?

A. I prepared a portion of them and some of them were [fol. 258] prepared under my supervision, sir.

Q. Now, I note that at the end of each year, 1944, '45, and '46, with respect to each boat and also with respect to the total, there appears certain per cents that range ap-

parently on this chart between 1 and 2%, what are those per cents?

A. They simply represent the per cent of the barrel miles moved in Ohio waters as we have indicated in each of these columns, in relation to the total barrel miles that were moved by the boats, but are involved in the particular page.

Q. When you say Ohio waters, what do you mean?

A. I mean moved on the Ohio River between that section of the river, which is between the state of Ohio and state of Kentucky, from the Indiana, Ohio boundary to Bromley, Ohio.

Mr. Day: At this point, I wish to offer in evidence Appellant's Exhibit No. 2.

Mr. Ford: Any objection?

Mr. Tate: No objection.

Mr. Ford: Upon request of counsel for appellant and without objection, Appellant's Exhibit No. 2 is admitted in evidence.

Q. Mr. Pattison, in what state are these boats registered?

A. They are registered in the state of Ohio.

Q. What does that mean?

A. It means they designate the home port of a document vessel as being Cincinnati, Ohio, in our case, that is the papers, but the home port of each of the two boats in question is Cincinnati, Ohio.

Q. Now, do these boats at any time go into Ohio ports?

A. They do from time to time go into Ohio ports.

[fol. 259] Q. Upon what type of occasion do they do that?

A. In those years under consideration when a boat discharged its cargo at Bromley, it from time to time on its down river trip to pick up another cargo might stop at Cincinnati. Might be for any number of reasons, might be minor repairs, call in an electrician, a welder, something of that kind for a couple of hours, pick up some provisions or might be to have the tow boats fueled.

Q. When major repairs were to be made, or the boats dry docked, where would that take place, in the years in question?

A. To the best of my knowledge, no major repairs were ever accomplished at Cincinnati. The boats were dry

docked for scraping and painting, and things of that kind, it was done at Paducah, or St. Louis, or other down river points. It could have been accomplished at Cincinnati, but just as a matter of fact, it wasn't and also nowhere else in Ohio.

Q. Do you know these boats were registered from Cincinnati, from Ohio?

A. I don't believe I do, I think it could have been any place.

Q. You said that these boats from time to time called at Cincinnati when they were up on their Bromley trip for fuel or for provisions, or for minor repairs, did they also stop at other places for similar things?

A. At the southern end of the run, likewise, after a matter of ten days or two weeks had elapsed, they would have to fuel up or might fuel up at Louisiana, and provision up down there, or similarly, if they had any trouble, they might call in any repairman, anywhere along the river where some trouble might occur, as Memphis, or Woodriver or any other place where a repair yard was available, they would stop and take care of it.

[fol. 260] Q. And aside from these stops at Cincinnati, to have minor repairs, or to refuel, or to provision, were the boats ever laid up in Cincinnati in these years?

A. To the best of my knowledge, they were not.

Q. Now, so far, Mr. Pattison, you have testified with respect to the boats and barges of the company that were in crude oil service in the years 1944 and '45, is that right?

A. That's right, sir.

Q. At the beginning of your testimony, you stated that there were also some boats or a boat and barges that were in product service, would you tell us about that?

A. We had one boat, the tow boat Sohio operating at that time for the Standard Oil Company for the movement of product. She had three barges.

Mr. Ford. You mean finished product?

The Witness: Finished product, gasoline, kerosene, fuel oil and so forth. She had two barges regularly, 26,000 barrel barges, she normally moved from Bromley, as these products came out of the LaTonia Refinery. They were loaded in the barges of the tow boat Sohio, moved north

and east up to various towns like Sciotoville, East Liverpool and Steubenville, Marietta, and so forth, all of the various river terminals that we had. Also she loaded out of the other principal ports, which was Kenova, West Virginia, being the plant of the Ashland Oil and Refinery Company; but all of her movements were, I can't think of any exception, all of her movements were movements on the Ohio River between Ohio, the state of Ohio, and the states of Kentucky and West Virginia. In other words, movement on the Ohio along the river which was adjacent to the State of Ohio, 100%, with perhaps very few exceptions.

[fol. 261] Q. Is it part of the river that was transversed by your product service boat shown on Appellant's Exhibit No. 1?

Mr. Ford: Exhibit No. 1.

The Witness: Yes, it is on the map.

Q. How is it shown on that Exhibit No. 1?

A. We have distinguished that with a green pencil, as against the crude as shown in red.

Mr. Ford: I see.

Q. In the years in question were barges that were used with the crude oil boats always used with crude oil boats or sometimes used with the product boats?

A. To the best of my knowledge, they are always used with crude oil boats.

Q. And the ones that were used with the product boats, were they always used with the product boats?

A. To the best of my knowledge, they were always used with the product boats.

Mr. Ford: I don't believe I just understand that. Do I understand that the barges that were used in connection with the product boats were used exclusively on products, that is the barges were?

A. The barges, were, Mr. Ford, I think to the best of my knowledge, because in times gone by there has been instances, due to certain emergencies, this is since we have had to change clean barges to dirty barges. It is an expensive proposition and we don't make a habit of that.

Q. How many barges did you have in these years in the product service?

A. We had three barges.

Q. The rest of them were in the crude oil service?

A. The rest of them were in the crude oil service.

Q. On January 1st of 1945 and on January 1st, 1946, did the company intend to use its crude oil boats in any [fol. 262] manner different than it had been using them on the year ending on those dates?

A. No, sir, they didn't.

Q. At the time when the company acquired these boats, did it plan to use them in any different method from what it had used them?

A. No, sir, they did not.

Mr. Day: Your witness, Mr. Tate.

Cross Examination.

By Mr. Tate.

Q. Mr. Pattison, directing your attention to Appellant's Exhibit No. 1, would you state whether that exhibit shows mileage from any particular point to any other particular point? That is, does this exhibit purport to show the mileage from distant points to Bromley, Kentucky?

A. No, it does not show it.

Q. Now, in the preparation——

Mr. Ford: You mean Gibson Point, or Gibson Landing?

Mr. Tate: Gibson Landing.

The Witness: It shows them indirectly, Mr. Tate, the mileages are listed down there, so many miles south of Pittsburgh, you notice the figures on the map. In other words, you can pick up from the map the distance from Gibson Landing, let's say, to Bromley without reverting back to this relation to Pittsburgh.

Q. Now, just for my edification and by way of explanation, will you take for example Pittsburgh and show how the mileage is ascertained from Pittsburgh to any point on the Mississippi, for example, Gibson Landing?

A. Well, you take here it is for example, 70 miles below Pittsburgh, Steubenville, 90 miles below Pittsburgh, Mar-

tins Ferry, and then down the list, Sciotoville, 349 miles below Pittsburgh, and Bromley, 474 miles below Pitts-
[fol. 263], burgh, and Owenboro, 757 miles below Pittsburgh, subtract 757, any one of the points, and the differential would be the mileage.

Q. Now, forgetting for the purpose of computing the mileages reflected by Appellant's Exhibit 2, was Pittsburgh used as a starting point?

A. No, it wasn't.

Q. Now, then, referring to Appellant's Exhibit No. 2, and directing your attention more particularly to column 3, which is headed "actual miles," and coming to column 4, which is headed "miles operated in Ohio waters," will you tell me, for example, the manner in which the figure 1192 shown under the column "actual miles," was ascertained?

A. There are two mileages on the river, I might give you, one is the coast guard light list mileage. Everybody in the industry uses the coast guard mileage, 42 volumes of it published, the Coast Guard puts out, which is called "Light List Mileages," they use that as a guide and Bible. It does not take into consideration, however, certain cut-offs, which the tow boats actually use on the Mississippi. That's what they call long mileages, the actual bends and turns in the Mississippi and in the calculation in barrel miles in performance which we in terms of performances we do not use the so-called light list. They indicate a mileage which is greater than that actually moved by a particular boat in question, so we have to take into consideration these so-called cut-offs, three or four of them, on the lower Mississippi, amounting to 1600 miles, which would alter the mileage as given at Coast Guard light lists, would shorten it.

Q. Which mileage did you use in the preparation of your Appellant's Exhibit No. 2.

A. We used the combination of two, Mr. Tate, we used [fol. 264] the Coast Guard light mileages from Pittsburgh on down to the junction of the Ohio and Mississippi to Birds Point, or Wyatt on the lower Mississippi, since cut-offs are a factor in performance of our boats, we included the cut-offs.

Q. Directing your attention to Exhibit No. 2, at the upper left-hand corner, and more particularly to line 3 over in the first column, which is indicated Gibson Landing, La., to Bromley, Kentucky, that mileage is shown?

A. 1,192.

Q. Do I understand that is the total mileage from Gibson Landing to Bromley?

A. That is correct.

Q. Next to the column, headed "Miles operated in Ohio waters," 17.5, that 17.5 is a part of the 1192?

A. That 17.5 is a part of the 1192.

Q. After that boat arrived at Bromley and discharged crude oil, what, if any, movement did it make from that point, if you know?

A. It turned around and went back to pick up another load.

Q. Would that boat normally go back empty or would it stop at any place and load anything?

A. In those years in question it normally went back empty, in all instances it went back empty.

Q. Now, would that be when you say those years, you mean particularly 1944 and '45, calendar years?

A. I mean particularly 1944 and '45 calendar years.

Q. I believe you testified on direct examination that the mileage from the Indiana-Ohio line to Bromley was approximately 17½ miles?

A. Yes, sir.

Q. Now, in preparing this schedule, and more particularly in preparing that portion of the schedule and that column headed "Miles operated in Ohio waters," did you take the miles traveled as an entirety or did you take the miles traveled just from the line to Bromley?

[fol. 265] A. In terms of barrel miles we never consider a back haul. When you start at Gibson Landing and go to Bromley and return, the mileage is indicated as 1192 one way, that is a single trip. Double it for the round trip, but in terms of barrel miles you wouldn't take that, since the barrels hauled are only in one direction.

Q. So we understand each other, am I correct in construing your testimony to be that your mileage operated in

Ohio is only miles at a time when crude oil was being carried?

A. No, you are right, when you say the crude oil was in the barges on the movement up to Bromley, and the boat turned around, and reversed itself, came back empty and traveled 17½ miles coming back.

Q. 17½ miles is not included as a part of the miles operated in the Ohio waters?

A. That is correct.

Q. For the purpose of the preparation of this document, that is Appellant's Exhibit No. 2?

A. That's right.

Q. Now, I believe during the course of your examination you mentioned something about a motor vessel known as the Mount Vernon, is that correct.

A. That is correct.

Q. Now, between what points, during the years in question, that is during the calendar years 1944 and '45, between what points did that vessel operate?

A. She did not operate between any points. She is similar, let's say, to a harbor tug. All she does, you take one of the big tows, the Sohio moves in with six large barges with 110,000 barrels of crude, they can't all be lined up at the dock, for discharging at one time, some of them have to be taken off to the side of the bank and tied up, and it is a job of the little tug, let's say, to move those things back into the position for discharging or move them [fol. 266] out of the way, after they have been discharged, so the next one can get in there, so as to facilitate the operation and speed it up.

Q. Then that boat, to which reference has just been made, namely, the Mount Vernon Motor Vessel, if that is the correct term, is that a boat which stays in the particular locality of Bromley during most of the year?

A. It stays at a terminal all the year, that's right.

Q. Now, during the years 1944 and '45, and I have reference to calendar years, where was that particular vessel stationed during the majority of those two years, if you know?

A. I am in an awkward position, I don't know at the present time I think the Mt. Vernon at the present time

we have that located at Mayersville, Mississippi, twelve months of the year. At that time I believe, I will have to check it, but I think it was located at Mount Vernon, Indiana.

Q. Am I correct in my understanding that some portion of the calendar year that boat was used to assist the larger boats in docking, that is acting as a tow?

A. To assist in moving of let's say barges from the shore to the dock.

Q. During those operations, that boat would be operated in waters that were at least adjacent to the state of Ohio?

A. No, sir, not that, I would have to check that, I honestly can't tell you where she was located in 1944 and '45. To the best of my recollection, it was Mount Vernon, Indiana.

Mr. Tate: I think that's all, Mr. Pattison.

Examined by Mr. Ford.

Q. Did I understand you, that these boats and barges that were engaged in crude oil operation during the years [fol. 267] 1944 and '45 nosed into Cincinnati for repairs or for provisioning only after the cargo had been discharged, and it was on its downward trip?

A. That's right.

Q. Is Bromley up the river, or down the river from Cincinnati?

A. It is four miles down river.

Mr. Ford: That's all.

Re-direct examination.

By Mr. Day.

Q. Mr. Pattison, I have a couple of questions here. You say that during the years 1944 and '45, you think the Mount Vernon was operating at Mount Vernon, Indiana?

A. That's right.

Q. Do you know whether it was for any part of those two years operated at Bromley, Kentucky?

A. I do not, sir, I can find that out readily.

(Discussion off the record.)

Q. On the record, now, one other question, Mr. Pattison, averting to Appellant's Exhibit No. 2, to the second line relating to the route from Gibson Landing, Louisiana, to Bromley, Kentucky, you have stated that the 17½ miles as indicated, being operated in the Ohio River, adjacent to Ohio, includes only one way on that trip, includes only the distance from the Indiana border up to Bromley, and not the distance back, is that correct?

A. That is correct.

Q. Now, I am through with Mr. Pattison, reserving only the right to question him further with respect to the Mount Vernon.

(After Mr. Pattison was excused to obtain certain information he was again recalled to the stand.)

[fol. 268] And also: HENRY WILLIAM PATTISON, recalled, having been previously duly sworn, testified as follows:

Examined by Mr. Day.

Q. Mr. Pattison, have you now ascertained whether the boat named the Mount Vernon was used at any time in Bromley during the years 1944 and '45?

A. No, as earlier testimony indicated, she was used exclusively at Mount Vernon, Indiana, and she was used as we earlier indicated always simply to move and spot empty and loaded barges. For example, a tow might come in with twelve barges, the capacity of the loading dock would only accommodate six barges. The main tow boat would spot the six barges, and then might have to drift on for some little repair or provisioning, or refueling, or something, and the little tow boat, Mount Vernon, would come in and remove those six, after they had been completely unloaded, and spot the remaining six. Used strictly as a harbor boat with one exception, we have a shall river terminal, Henderson, Indiana, I don't believe it is indicated on the map.

Mr. Ford: That is Henderson, Kentucky?

The Witness: If is off to the east there, I might be confused, Henderson is in Kentucky, about twenty-five

miles to the east of Mount Vernon, and there one week I have been told the little tow boat, Mount Vernon, would make a trip with about 4000 barrels of crude in one barge from Henderson to Mount Vernon. With that exception in which she was used as a tow boat for this short movement, she was used only as a terminal boat, solely within the confines of the terminal, and she is currently at Mayersville, moved them down there in July.

[fol. 269] Q. Mayersville, where?

A. Mayersville, Mississippi.

Q. During the years 1944 and '45, it was not used in any waters adjacent to Ohio?

A. Never been used in waters adjacent to Ohio.

Q. How much was the original cost of that boat?

A. I don't have the figures here, and I asked that question and was told it was entered on our books at a gross cost of $3500, it is a 110 horse power boat, that is probably a little low, which indicates to us that we probably purchased it second-hand.

Mr. Day: That's all.

Cross-examination.

By Mr. Tate:

Q. You have used the term "spot the barges," will you just for my benefit explain what that means?

A. That means spots, these unloading docks are located off the bank of the river. These unloading docks extending out 50, or 75, 100 feet long, and it is necessary to locate these barges adjacent to the docks so that the manifolds and the valves would line up, so the hose connection can be made appropriately, and it is just a question of just that lining up the hose connection, so that you can discharge efficiently.

Mr. Tate: Nothing further.

The Witness: Could I add as to how we handle that same service at Bromley, and there is a multitude of tug service in Cincinnati area and we have been in the habit of hiring that service, it has been hired from the Cincinnati area.

[fol. 270] And also: WILLIAM N. KALL, called as a witness, being first duly sworn, as provided by law, testified as follows:

Examination by Mr. Day:

Q. Will you state your full name?
A. William N. Kall.
Q. Where do you live, Mr. Kall?
A. Cleveland, Ohio.
Q. And by whom are you employed?
A. By the Standard Oil Company.
Q. What is your position with the Standard Oil Company?
A. Chief tax accountant.
Q. How long have you been chief tax accountant?
A. For a little over two years.
Q. And in your position do you have access to and are you familiar with the property records and the books of the Standard Oil Company?
A. I am.
Q. Are you familiar with that for the years 1943 to date?
A. Yes.
Q. Mr. Kall, in our notice of appeal and other documents relating to 1945, it is stated that true value included in the assessment for boats and barges as of January 1st, 1945, is $1,322,863. Does that include both the crude oil boats and barges that we have been talking about, and the product boats and barges?
A. Yes, it includes all boats and barges.
Q. Can you tell us what part of that figure represents the product boats and barges?
A. Yes, I have available the figures pertaining to the boats and barges of the finished product use.
Q. Would you get those figures?
A. Yes.
Q. Please?
A. Yes.

[fol. 271] Mr. Ford: Now, you are inquiring as with re-pect of a particular tax year?

Mr. Day: Yes, as of January 1st, 1945.

(Discussion had off the record.)

Q. Mr. Kall, of the $1,322,863, which is shown as being the true value of the company's boats and barges as of January 1st, 1945, and 70% of which is the assessed value of the company's boats and barges as of January 1st, 1945, can you tell us what part represents the boats and barges in the product service?

A. The part applicable to boats and barges in product service as of January 1st, 1945, $109,541.64.

Mr. Ford: True value?

The Witness: True value.

Q. And the assessed value would be 70%?

A. Assessed value would be 70%.

Q. And would the balance of $1,322,863 be the boats and barges in crude oil?

A. The difference between the $1,322,863 and the $109,541, would be entirely applicable to the boats and barges in crude oil services.

Q. Now, as of January 1st, 1946, notice of appeal and other documents in the file show the true value of the boats and barges of the company in 1946 assessment as being $1,303,907, what part of that is the true value of the boats and barges in product service?

A. True value of boats and barges in product service as of January 1st, 1946, would be $102,022.06.

Mr. Tate: Give me that again.

The Witness: $102,022.06.

Q. Would the difference between the two figures, would that be the crude oil service as of January 1st, 1946?

A. That is correct.

[fol. 272] Mr. Tate: Do you have that difference there?

The Witness: No, I do not.

Mr. Day: I think that's all. I am through with Mr. Kall.

Mr. Tate: I have one or two questions for clarification of the record.

Cross-examination.

By Mr. Tate:

Q. Mr. Kall, directing your attention to the 1945 tax return, and more particularly to schedule 4, and at the bot-

tom thereof the book value of the boats as returned by Standard Oil Company is shown as $1,017,518.51, and subsequently the Tax Commissioner made an increase in that valuation, did he not?

A. Yes.

Q. And to what figure was that increased?

A. That was increased to $1,328,712.

Q. Now, this last figure of $1,328,712 includes, does it not, the value of a certain monoplane?

Mr. Ford: A certain what?

Mr. Tate: A monoplane, does it not?

The Witness: No, sir.

Q. Now, the figure that you gave me a few minutes ago, I believe was $1,322,863, now, what I am trying to find out Mr. Kall, is the discrepancy between that figure and the figure as shown on the return as the increase, can you explain that?

A. I may have to retract myself, I answered that too rapid, the $1,322,000, amended value on the boats and barges may be shown and add, come back to $1,328,000, to correct my previous answer, I could refer back to my work papers and so satisfy your question.

Q. That's right, now, the figure that you testified to on direct examination as to the true value of the product boats [fol. 273] as of January 1st, 1945, was $109,541.64, was that correct?

A. That is correct.

Q. Now, is that figure based on the increased figure, that is, does that $109,000 take into consideration an increase on those particular boats as reflected in the $1,328,712?

A. The figure of $109,541 remained the same, the increase which was made by the Commissioner applies to the crude oil boats and barges, and did not apply to the product boats and barges.

Q. Now, just to make sure we understand each other, at the time that you made your return, you listed the three tow boats and 31 tow barges, at $1,017,518.51, now, in listing that figure, you took into consideration then, did you not, that a portion of that amount represented the value of product boats?

A. That is correct, sir.

Q. And the figure that you took was $109,514.64?

A. That is correct.

Q. Now, did you assist in the preparation of the appellant's return for 1946?

A. I did, sir.

Q. And do you know whether that return confains a valuation of boats and water craft on Schedule 4?

A. It should, sir.

Q. Perhaps in an effort to assist you, may I call your attention to the 1946 return and ask you to point out to me where the value of those boats is reflected?

A. I don't find the schedule. May I refer to my copy of the work sheet? Schedule 4 of the return, this is the 1946 return?

Q. Let me ask you this question, the appellant's tax return as filed for 1946 shows what valuation on Schedule 4, is that the valuation of boats and water craft?

A. For boats and water craft, shows a depreciated book value of $726,733.53.

[fols. 274-574] Q. And was that figure subsequently increased by the Tax Commissioner?

A. That was increased by the Tax Commissioner.

Q. Do you know to what amount, that is the amount of the increase?

A. I will have to refer to my papers, I don't recall the figure mentally.

Q. Now, will you tell me the amount that is the figure to which it was increased?

A. The figure of $726,733.53 was increased to $1,303,907.

Q. I believe you testified that the true value of the product boats as of 1946 was $102,022.06?

A. That is correct.

Q. Now, that figure makes up part of the valuation as originally returned, does it not?

A. That is correct.

Mr. Tate: That's all.

Redirect examination

By Mr. Day:

Q. Mr. Kall, was there any increase made by the Department of Taxation in the value of the product boats and barges as shown on the return and as shown on their assessment?

A. There was no changes made to the figures of the product boats and barges as originally returned and subsequently corrected by the Commissioner on the crude oil boats and barges.

Q. Is that true for both 1944 and '45?

A. That is true for both tax returns for 1945 and '46.

Mr. Ford: Read that last question and answer.

(Question and answer read.)

Q. Your statement is true for both the tax years 1945 and '46?

A. That is correct.

(Discussion had off the record.)

[fol. 575] BEFORE THE TAX COMMISSIONER

ENTRY OF THE TAX COMMISSIONER, No. 3327, DATED APRIL 14, 1948

The application for review and redetermination of The Standard Oil Company, Cleveland, Ohio, an inter-county corporation, from an increased personal property tax assessment for the year 1945, after being duly heard, came on to be considered.

The Tax Commissioner being fully advised in the premises, finds that for the year 1945 assessment was made increasing the value of both personal property and intangible property over and above that as listed by the applicant as to items and amounts as follows:

Item	Amount of Increase
1. Average inventory values	$ 852,013.00
2. Net taxable credits	1,354,230.00

The Tax Commissioner finds that the average inventory values were increased by reason of the fact that applicant

determined the values as listed under the "Lifo" or, last-in, first-out method, and by reason of such fact the values as listed and returned did not reflect true value and finds that the true value of said inventory for such year is as reflected in the increased assessment and said assesssment as to the values so determined is hereby affirmed.

The Tax Commissioner further finds that the increase in net taxable credits over and above those as returned by said applicant was due principally to the fact that the applicant deducted taxes and annuities in determining the net taxable credits as so listed and finds that the deduction thereof by the applicant was in error and such assessment as to the increase in net taxable credits is hereby affirmed.

The Tax Commissioner further finds that applicant listed watercraft (boats and barges) at the depreciated book value thereof in the amount of $1,017,518 but finds that by reason of excessive reserves having been accumulated the true value of said property was in excess of that as returned and finds that the true value of boats and barges taxable in Ohio for 1945 was $1,322,863.00.

Applicant did not file a claim for deduction with respect to said boats and barges at the time of making return, but [fol. 576] in its application for review protested the assessment of said property on the basis that such property was not taxable in Ohio.

The Tax Commissioner finds that watercraft and aircraft belonging to persons residing in this state and not used in business wholly in another state are taxable in Ohio and orders that the true value of boats and barges in the amount of $1,322,863.00 be reflected in the final assessment certificate hereinafter ordered.

The Tax Commissioner being further advised in the premises, finds that personal property of the applicant other than boats and barges was listed at less than the true value thereof for the year 1945 in certain taxing districts, partially by reason of excessive reserves having been accumulated and partially by reason of applicant's failure to include in such listing, personal property in the process of construction and finds that the true value of personal property not returned by reason of excessive reserves was $739,022.00 and $681,157.00 of such amount was personal property used in manufacturing and that $57,865.00 was personal property used other than in manufacturing, and

that the true value of personal property in the process of construction and not returned was $41,716.00 for use in manufacturing and $38,936.00 for use other than in manufacturing.

The Tax Commissioner further finds that applicant listed personal property in the amount of $15,052,922.00 which was $561,037.00 more than the net book value thereof and included in such listing in Cleveland district was machinery used in manufacturing consisting of a catalytic cracking unit.

Applicant in its review and redetermination and evidence submitted in support thereof maintains that in the valuation of its catalytic cracking unit the Tax Commissioner should make an allowance for excessive costs and also an allowance for the general inflated level of the cost index during the war emergency and further contends that by reason thereof the true value of such unit is $3,000,000.00 as of January 1, 1945. Applicant further contends that its boats and barges are not subject to the personal property taxation under the Ohio laws.

The Tax Commissioner, being further advised in the premises, and consideration having been given to the claims made and evidence submitted by the applicant in support of said application for said year, finds that there is no author-
[fol. 577] ity in law or in long established administrative procedure for recognizing increased costs due to price increases in the determination of true value of personal property used in business; and that the claim of applicant in this regard should be and hereby is denied.

The Tax Commissioner finds that applicant at the time of filing its return did not file a claim in writing as provided in Section 5389, General Code, with respect to its machinery and equipment to the effect that the net depreciated book value was in excess of true value.

The Tax Commissioner further finds that the catalytic cracking unit was assessed in excess of the true value thereof in the amount of $988,000.00 by reason of allowable excessive costs and equipment not in use but that in view of the judicial determination (*Willys-Overland Motors, Inc.* v. *Evatt*, 141 O. S. 402) he is without jurisdiction to find a value below net depreciated book value and orders that the value of such property be reduced in the amount of $561,027.00 being the amount that the machinery and equipment

used in manufacturing in Cuyahoga County exceeded the net depreciated book value thereof, and it is ordered that final assessment certificate issue correcting the assessment in the amount so stated. In all other respects the assessment as to machinery and equipment is hereby affirmed and the Tax Commissioner finds that in the districts in which such incorrect listings were made or corrected herein, the true value of personal property used in manufacturing and used other than in manufacturing for such year, including boats and barges, was as follows:

[fols. 578-643]	Amended True Values
Used in Manufacturing	
Allen County—Shawnee Twp. Sch.	$ 794,961
Lima	365
Cuyahoga County—Cleveland	10,977,441
Lucas County—Oregon Twp.	3,442,001
	15,214,768
Used Other Than in Manufacturing	
Cuyahoga County—Cleveland	1,328,712
Portage County—Randolph Twp.	6,306
Suffield Twp.	49,338
Summit County—Franklin Twp. E. Sch.	15,650
Franklin Twp, W. Sch.	44,266
Green Twp.	34,656
Springfield Twp.	15,836
Wayne County—Chippewa Twp.	18,436
Hancock County—Washington Twp. Arcadia SD	20,414
Allen County—Lima	42,502
Belmont County—Martins Ferry	19,301
Carroll County—Center Twp. Carrollton SD	211
Cuyahoga County—Cleveland	635,891
Fayette County—Washington C. H.	5,867
Gallia County—Gallipolis	11,701
Hamilton County—Cincinnati	251,219
Mahoning County—Youngstown	47,393
Muskingum County—Zanesville	9,859
Richland County—Mansfield	27,516
Summit County—Akron	124,678
Other Counties—Various	3,243,832

The Tax Commissioner, therefore, orders that final assessment be made for the year 1945 in conformity with and reflecting the findings herein.

Department of Taxation,
C. EMORY GLANDER, *Tax Commissioner.*
(Duly certified.)

[fol. 644] BEFORE THE TAX COMMISSIONER

ENTRY OF THE TAX COMMISSIONER, No. 3276, DATED APRIL 13, 1948

The application for review and redetermination of The Standard Oil Company, Cleveland, Ohio, an inter-county corporation, from an increased personal property tax assessment for the year 1946, after being duly heard, came on to be considered.

The Tax Commissioner, being fully advised in the premises, finds that as to the year 1946 said applicant filed its return and thereafter increased assessment was made for such year and that such assessment reflected increases over and above those as returned by said applicant in the following respects:

Item	Amount of Increase
1. Average inventory values	$ 935,314.00
2. Net taxable credits	1,567,900.00

The Tax Commissioner finds that the average inventory values were increased by reason of the fact that applicant determined the values as listed under the "Lifo" or, last-in, first-out method, and by reason of such fact the values as listed and returned did not reflect true value and finds that the true value of said inventory for such year is as reflected in the increased assessment and said assessment as to the values so determined is hereby affirmed.

The Tax Commissioner further finds that the increase in net taxable credits over and above those as returned by said applicant was due principally to the fact that the applicant deducted taxes and annuities in determining the

net taxable credits as so listed and finds that the deduction thereof by the applicant was in error and such assessment as to the increase in net taxable credits is hereby affirmed.

The Tax Commissioner further finds that applicant listed machinery and equipment in Cuyahoga County for the year 1946 in the amount of $4,082,711.00 and that thereafter amended assessment certificate was issued in which the value of the machinery and equipment was increased over and above that as returned in the amount of $6,916,129.00, such increase being due to the failure of the applicant to list machinery and equipment consisting of a catalytic cracking unit; such unit having been fully reserved on the books of the applicant. Applicant also failed to list personal [fol. 645] property with a true value of $741,979.00 by reason of excessive reserves having been accumulated and of which $938.00 was used in manufacturing and $163,868.00 was used other than in manufacturing and $577,173.00 was boats and barges. Applicant also failed to list personal property with a true value of $928,686.00 which was in the process of construction of which $904,651.00 was to be used in manufacturing and $24,035.00 was to be used other than in manufacturing.

At the time of filing its return, applicant filed a claim for deduction from book value in words and figures as follows:

		Schedule 2
"Cleveland City,	Book Value	$3,142,425.00
Totals	Book Value	3,142,425.00
	Deduction Claimed	—
	Claimed True Value	6,991,741.00

"The depreciated book value figure of $3,142,425 given in Item 1 represents the depreciated book value of the Cleveland Refinery machinery and equipment shown on Schedule 2 of the return and includes the Catalytic Cracker (Houdry unit) at Cleveland at a book value of ZERO, for the reason that the book value of this unit through depreciation (including amortization) was reduced to ZERO by January 1, 1946. Should the depreciated book value of this Houdry Unit be properly deemed higher than ZERO within the meaning of G. C. 5389, than the figure of $3,142,425.00 is to be

treated as increased by such excess over ZERO, and the deduction claimed shall be not ZERO, but the excess of such increased figure over the true value of the refinery personalty of $6,991,741 above mentioned.

"The supporting data with respect to the above claim are already in the possession of the Department of Taxation.

"*Statement Forming Part of the Return*

"In connection with the return to which this is attached we wish to call attention to the fact that the return shows a total true value for the Cleveland refinery machinery equipment in Schedule 2 of $3,991,741. This amount should be increased by $3,000,000 to reflect and include the true value of the Houdry unit above mentioned bringing the aggregate true value of Schedule 2 to $6,991,714.00"

Applicant maintains that in the valuation of its catalytic cracking unit the Tax Commissioner should make an allow- [fol. 646] ance for excessive costs and also an allowance for the general inflated level of the cost index during the war emergency and further contends that by reason thereof the true value of such unit is $3,000,000.00 as of January 1, 1946. Applicant further contends that its boats and barges are not subject to personal property taxation under the laws of Ohio.

The Tax Commissioner, being further advised in the premises, and consideration having been given to the claims made and evidence submitted by the applicant in support of said application for said year, finds that there is no authority in law or in long established administrative procedure for recognizing increased costs due to price increases in the determination of true value of personal property used in business; and that the claim of applicant in this regard should be and hereby is denied.

The Tax Commissioner further finds that in the amended assessment certificate heretofore issued the catalytic cracking unit was assessed in excess of the true value thereof in the amount of $932,360.00 by reason of allowable excessive costs and equipment not in use and finds that the true

value of said catalytic cracking unit as of January 1, 1946 was $5,983,769.00 and further finds that boats and barges were properly assessed as having a taxable situs in Ohio and likewise finds that there was no error in the assessment of the personal property which taxpayer failed to list by reason of excessive reserves having been accumulated and further finds that there was no error in the assessment of personal property in the process of construction and the assessment as heretofore made as to such property is hereby affirmed.

In view of the foregoing, the Tax Commissioner finds that in the districts in which such incorrect listings were made, the true value of personal property used in manufacturing and used other than in manufacturing, for such year, including boats and barges, is set forth as to amounts in the districts in the schedule below:

Used in Manufacturing	Amended True Values
Allen County—Shawnee Twp. Shawnee RSD	$ 778,163
Cuyahoga County—Cleveland	10,960,267
Lucas County—Oregon Twp.	3,226,760

[fols. 647-649] Used Other Than in Manufacturing

	Amended True Values
Cuyahoga County—Cleveland	1,354,493
Portage County—Randolph Twp.	5,701
—Suffield Twp.	44,883
Summit County—Franklin Twp. E. Sch	14,301
—Franklin Twp. W. Sch.	43,859
—Green Twp.	31,478
—Springfield Twp.	14,169
Wayne County—Chippewa Twp.	16,618
Hancock County—Washington Twp. Arcadia R. S. D.	40,013
Cuyahoga County—Cleveland	670,989
—Brecksville	5,803
—Euclid	11,049
—Chagrin Falls	5,607

Used Other Than in Manufacturing	Amended True Values
Defiance County—Defiance	3,040
—Hicksville	3,792
Fairfield County—Lancaster	7,711
Franklin County—Columbus	112,936
Fulton County—Wauseon	3,003
—Fayette	2,722
Geauga County—Chardon	3,307
Hamilton County—Cincinnati	239,683
Henry County—Napoleon	3,839
Jefferson County—Steubenville	15,477
Lake County—Painesville	8,118
Lawrence County—Ironton	6,732
Lucas County—Maumee	6,273
—Toledo	161,704
Ross County—Chillicothe	8,745
Scioto County—Portsmouth	64,413
Summit County—Akron	114,858
Williams County—Bryan	4,381
Wood County—Grand Rapids	4,666

The Tax Commissioner further finds that in all other respects the assessment as heretofore made is correct and it is ordered that final assessment certificates issue reflecting the above findings.

Department of Taxation,
C. EMORY GLANDER,
Tax Commissioner.
(Duly Certified.)

(Here follows 1 Photolithograph, side folio 650, and 1 paster, folio 651-737)

Before the Board of Tax Appeals

102A

(Put check mark →) ✓

109

APPELLANT'S EXHIBIT 1.

Map.

SOUTH DAKOTA
MINNESOTA
WISCONSIN
LAKE MICHIGAN
LAKE HURON
MICHIGAN
LAKE ONTARIO
NEW YORK
LAKE ERIE
PENNSYLVANIA
NEBRASKA
IOWA
OHIO
PRODUCTS
PIPE LINE DIVISION
INDIANA
ILLINOIS
EASTERN DIVISION
MT. VERNON DIVISION
WEST VIRGINIA
Green
Red
KANSAS
MISSOURI
GRANVILLE DIVISION
KENTUCKY
VIRGINIA
NORTH CAROLINA
OKLAHOMA
TENNESSEE
ARKANSAS
SOUTH CAROLINA
MISSISSIPPI
ALABAMA
GEORGIA
ATLANTIC OCEAN
TEXAS
LOUISIANA
FLORIDA
MEXICO
GULF

~: LEGEND :~

Range Destinations

Refer Origins

Red → Sohio Petroleum Co.

Green → Std. Oil Co.

THE STANDARD OIL CO. (OHIO) AND SUBSIDIARY COMPANIES

TRANSPORTATION OPERATIONS

SCALE 1" = 50 MILES

DWG. NO. ML-7-47D

DRAWN BY HHN

DATE OCT. 15, 1948

REVISED:

65

[fols. 651-737]

SOHIO PETROLEUM COMPANY—CRUI
OWNED BOATS ONLY

From	To	Actual Miles	Miles Operated In Ohio Waters	Steamer Atlas (Ended with October 1944) Bbls delivered	Total BM (00's)	BM In Ohio Waters (00's)	Steamer Renown (Ended with October 1944) Bbls delivered	Total BM (00's)	BM In Ohio Waters (00's)	M. V. Sohioan Bbls delivered	Total BM (00's)	BM In Ohio Waters (00's)	M (Str. Jo Bbls delivered
1944													
Cairo, Ill.	Mt. Vernon, Ind.	151	—0—	6,083	9,185	—0—				9,214	13,913	—0—	55,127
Gibson Landing, La.	Bromley, Ky.	1,192	17.5							92,760	1,105,699	16,233	162,044
Memphis, Tenn.	Mt. Vernon, Ind.	382	—0—	443,917	1,695,763	—0—	452,460	1,728,397	—0—	1,140,841	4,358,013	—0—	109,256
" "	Bromley, Kentucky	738	17.5	323,138	2,384,758	56,549	222,448	1,641,666	38,928	915,150	6,753,807	160,151	108,887
Mt. Vernon, Ind.	" "	356	17.5				4,428	15,764	775	6,689	23,813	1,171	
Baton Rouge, La.	" "	1,350	17.5										107,463
Memphis, Tenn	Catlettsburg, Ky.	894	174.3				31,596	282,468	55,072				
TOTAL, 1944				773,138	4,089,706	56,549	710,932	3,668,295	94,775	2,164,654	12,255,245	177,555	542,777
RATIO OF BM IN OHIO WATERS TO TOTAL BM					1.38%			2.58%			1.45%		
1945													
Cairo, Ill.	Mt. Vernon, Ind.	151	—0—							36,619	55,295	—0—	17,619
Mt. Vernon, Ind.	Louisville, Ky.	218	—0—							8,421	18,358	—0—	
Cairo, Ill.	Bromley, Ky.	507	17.5							93,687	474,993	16,395	
Tiptonville, Tenn.	Mt. Vernon, Ind.	238.6	—0—							105,348	251,360	—0—	
Memphis, Tenn.	" " "	382	—0—							953,207	3,641,251	—0—	497,223
West Wego, La.	Louisville, Ky.	1,237	—0—							92,110	1,139,401	—0—	
Memp Tenn.	Bromley, Ky.	738	17.5							279,176	2,060,319	48,856	242,887
Gibson Landing, La.	Mt. Vernon, Ind.	748.3	—0—							70,198	525,292	—0—	145,257
Baton Rouge, La.	Bromley, Ky.	1,241.7	17.5							293,939	3,649,841	51,439	
Buckhorn Landing, La.	Mt. Vernon, Ind.	665.4	—0—							101,627	676,226	—0—	39,900
Cairo, Ill.	Paducah, Ky.	47	—0—										7,874
Gibson Landing, La.	Louisville, Ky.	966.3	—0—										
Batofi Rouge, La.	Memphis, Tenn.	503.7	—0—										
Gibson Landing, La.	Bromley, Ky.	1,104.3	17.5										
Meraux, La.	Tiptonville, Tenn.	792	—0—										
TOTAL, 1945										2,034,332	12,492,336	116,690	950,760
RATIO OF BM IN OHIO WATERS TO TOTAL BM											0.93%		
TOTAL 1944 & 1945				773,138	4,089,706	56,549	710,932	3,668,295	94,775	4,198,986	24,747,581	294,245	1,493,537
RATIO OF BM IN OHIO WATERS TO TOTAL BM					1.38%			2.58%			1.19%		
1946													
Memphis, Tenn.	Wood River, Ill.	428.5	—0—										97,434
" "	Bromley, Ky.	738	17.5							1,189,338	8,777,314	208,134	144,480
" "	Mt. Vernon, Ind.	382	—0—							212,829	813,007	—0—	272,874
Mayersville, Miss.	Bromley, Ky.	983	17.5							857,331	8,427,564	150,033	219,250
" "	Mt. Vernon, Ind.	627	—0—										56,144
Mt. Vernon, Ind.	Bromley, Ky.	356	17.5										
Cairo, Ill.	Mt. Vernon, Ind.	151	—0—										255,984
Buckhorn Landing, La.	" " "	665.4	—0—										204,832
Wood River, Ill.	Bromley, Ky.	704.5	17.5										53,873
Gibson Landing, La.	Mt. Vernon, Ind.	748.3	—0—										56,148
Mt. Vernon, Ill.	Catlettsburg, Ky.	512	174.3										45,548
TOTAL, 1946										2,259,498	18,017,885	358,167	1,406,567
RATIO OF BM IN OHIO WATERS TO TOTAL BM											1.99%		
TOTAL 1944, 1945 & 1946				773,138	4,089,706	56,549	710,932	3,668,295	94,775	6,458,484	42,765,466	652,412	2,900,104
RATIO OF BM IN OHIO WATERS TO TOTAL BM					1.38%			2.58%			1.53%		

LANT'S EXHIBIT 2

E BOARD OF TAX APPEALS

PANY—CRUDE OIL RIVER OPERATIONS

OATS ONLY 1944-1945-1946

M. V. Sohio-Memphis (Str. Johnson during June 1944)			Steamer Sohio Fleetwing (S. S. Bou Arada 11-44 to 3-46)			M. V. Sohio Southern (Began July 1946)			Steamer Coral Sea (November 1944 to October 1945)			Total Owned Boats		
Bbls delivered	Total BM (00's)	BM In Ohio Waters (00's)	Bbls delivered	Total BM (00's)	BM In Ohio Waters (00's)	Bbls delivered	Total BM (00's)	BM In Ohio Waters (00's)	Bbls delivered	Total BM (00's)	BM In Ohio Waters (00's)	Bbls delivered	Total BM (00's)	BM In Ohio Waters (00's)
55,127	83,242	—0—	17,773	26,837	—0—							88,197	133,177	—0—
162,044	1,931,564	28,358	84,895	1,011,948	14,857				35,411	422,099	6,197	375,110	4,471,310	65,645
109,256	417,358	—0—	106,053	405,122	—0—				101,424	387,440	—0—	2,353,951	8,992,093	—0—
108,887	803,586	19,055										1,569,623	11,583,817	274,683
107,463	1,450,751	18,806	92,687	1,251,275	16,220				68,258	921,483	11,945	11,117	39,577	1,946
												268,408	3,623,509	46,971
												31,596	282,468	55,072
542,777	4,686,501	66,219	301,408	2,693,182	31,077				205,093	1,731,022	18,142	4,698,002	29,125,951	444,317
		1.41%			1.15%						1.05%			1.53%
17,619	26,605	—0—	60,673	91,616	—0—							114,911	173,516	—0—
			8,650R	43,856R	1,514R							8,421	18,358	—0—
												85,037	431,137	14,881
497,223	1,899,392	—0—	677,091	2,586,488	—0—				216,552	827,229	—0—	105,348	251,360	—0—
												2,344,073	8,954,360	—0—
242,887	1,792,506	42,505	630,900	4,656,042	110,408				96,137	709,491	16,824	92,110	1,139,401	—0—
145,257	1,086,958	—0—							118,499	886,728	—0—	1,249,100	9,218,358	218,593
			374,078	4,644,927	65,464				247,911	3,078,311	43,384	333,954	2,498,978	—0—
39,900	265,495	—0—	97,116	646,210	—0—							915,928	11,373,079	160,287
7,874	3,701	—0—										238,643	1,587,931	—0—
												7,874	3,701	—0—
									84,581	817,306	—0—	84,581	817,306	—0—
									97,621	491,717	—0—	97,621	491,717	—0—
									259,585	2,866,597	45,427	259,585	2,866,597	45,427
									105,348	834,356	—0—	105,348	834,356	—0—
950,760	5,074,657	42,505	1,831,208	12,581,427	174,358				1,226,234	10,511,735	105,635	6,042,534	40,660,155	439,188
		0.84%			1.39%						1.00%			1.08%
1,493,537	9,761,158	108,724	2,132,616	15,276,609	205,435				1,431,327	12,242,757	123,777	10,740,536	69,786,106	883,505
		1.11%			1.34%						1.01%			1.27%
97,434	417,505											97,434	417,505	—0—
144,480	1,066,262	25,284	966,688	7,134,157	169,170							2,300,506	16,977,733	402,588
272,874	1,042,379	—0—	334,235	1,276,778	—0—							819,938	3,132,164	—0—
219,250	2,155,228	38,369	557,226	5,477,532	97,515	644,919	6,339,554	112,861				2,278,726	22,399,878	398,778
56,144	352,023	—0—	107,185	672,050	—0—	113,588	712,197	—0—				276,917	1,736,270	—0—
			6,175	21,983	1,081							6,175	21,983	1,081
255,984	386,536		16,855	25,451	—0—							272,839	411,987	—0—
204,832	1,362,592	—0—	98,532	655,632	—0—	45,591	303,363	—0—				348,955	2,321,947	—0—
53,873	379,535	9,428										53,873	379,535	9,428
56,148	420,155	—0—				48,659	364,115	—0—				104,807	784,270	—0—
45,548	233,206	79,390										45,548	233,206	79,390
1,406,567	7,815,781	152,471	2,086,896	15,263,583	267,766	852,757	7,719,229	112,861				6,605,718	48,816,478	891,265
		1.95%			1.75%			1.46%						1.83%
2,900,104	17,576,939	261,195	4,219,512	30,540,192	473,201	852,757	7,719,229	112,861	1,431,327	12,242,757	123,777	17,346,254	118,602,584	1,774,770
		1.49%			1.55%			1.46%			1.01%			1.50%

[fol. 738] IN THE SUPREME COURT OF OHIO

THE STANDARD OIL CO., APPELLANT, *v.* GLANDER, TAX COMMR., ET AL., APPELLEES

Taxation—Personal property—Boats and barges of Ohio corporation—Operated on Mississippi and Ohio rivers—Sections 5325 and 5328, General Code—Machinery and equipment in process of construction—"Used" in business, when—Section 5325-1, General Code—Valuation—Obsolescence and functional depreciation to be considered—Machinery inefficient and uneconomical due to change in business conditions—Board of Tax Appeals—Decision refusing reduction in valuation unreasonable and unlawful, when—Article XIV, Amendments, U. S. Constitution.

SYLLABUS

1. The provisions of Section 5328, General Code, that "all ships, vessels and boats, * * * defined in this title as 'personal property,' belonging to persons residing in this state * * * shall be subject to taxation," and the provisions of Section 5325, General Code, defining "personal property" as including "every ship, vessel, or boat, of whatsoever name or description, used or designed to be used either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere, and whether it has been enrolled, registered, or licensed at a collector's office, or within a collection district in this state, or not," authorize the taxation, at their true value, of boats and barges owned by an Ohio corporation and operated partly on the Mississippi river and partly on the waters of the Ohio river adjacent to the state of Ohio. The tax levied on such boats and barges, pursuant to such statutory provisions, is not violative of the provisions of the Fourteenth Amendment of the Consitution of the United States.

2. The provisions of Section 5325-1, General Code, that "personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or

instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not," authorize the taxation of personal property "kept and maintained as a part of a 'plant' capable of operation." The word "plant" as used in such section is to be construed and applied as commonly understood in its ordinary acceptation and significance. Machinery and equipment designed for the [fol. 739] production of gasoline, which are in the process of erection and construction as an addition to an operating oil refinery, constitute a part of "a plant capable of operation" and are subject to taxation by virtue of the provisions of Section 5325-1, General Code, as property "used in business."

3. Where property, due to a change in business conditions, has become obsolete, it is unreasonable and unlawful, in determining the valuation of such property for taxation purposes, not to take into consideration that machinery especially designed and constructed during a war period for the manufacture of high octane aviation gasoline, but which machinery is no longer used for such purposes by reason of the fact that the demand for such aviation gasoline has ceased, was subsequently devoted to the manufacture of other motor fuels in which such machinery is inefficient and uneconomical in operation. Such facts are competent and pertinent evidence of obsolescence and functional depreciation and are essential factors in the determination of the value of the property for tax purposes. (*B. F. Keith Columbus Co.* v. *Board of Revision of Franklin County*, 148 Ohio St., 253, approved and followed.)

4. Where a taxpayer returns its tangible personal property at a valuation in excess of the book value thereof, although filing no claim for reduction from book value under Section 5389, General Code, in connection therewith, pays the tax theretofore determined thereon, and upon audit omitted property claimed by the taxpayer to be not subject to tax is added and assessed by the Tax Commissioner, from which assessment an appeal is taken under Section 5611, General Code, it is unreasonable and unlawful for the Board of Tax Appeals, upon finding that

the taxpayer was entitled to a reduction in valuation in a sum which would not reduce the total value of the property assessed below the book value thereof, as shown by the taxpayer in his return, to refuse such reduction on the grounds that such tax has been paid and the time for issuance of the final amendment certificate by the Tax Commissioner has expired during such appeal. (*Wright Aeronautical Corp. v. Glander, Tax Commr.*, 151 Ohio St., 29, distinguished.)

(No. 32060—Decided March 14, 1951.)

Appeal from the Board of Tax Appeals.

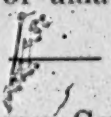
STATEMENT OF THE CASE

The appellant is The Standard Oil Company, an Ohio corporation, and the appellees are C. Emory Glander, Tax [fol. 740] Commissioner of Ohio, and John A. Zangerle, auditor of Cuyahoga county.

This appeal from the Board of Tax Appeals involves the final orders and tax assessments made by the Tax Commissioner with respect to and on certain tangible personal property of the appellant for the tax years 1943, 1944, 1945 and 1946, respectively. Three separate appeals to the Board of Tax Appeals were prosecuted by the appellant which were consolidated in the hearing by that board. One of the appeals, involving the validity of a final assessment by the Tax Commissioner for the year 1945, was decided in favor of the appellant and no appeal was prosecuted to this court. The appeal to this court is limited to the decision of the Board of Tax Appeals in regard to Tax Commissioner's case No. 12488, which involves a final assessment certificate and an amendment thereof assessing taxes for the tax years 1943 and 1944 on a Houdry catalytic cracking unit which was in the process of construction on January 1, 1943, and on January 1, 1944, but which was not completed and not in operation on either of those tax-listing dates, and Tax Commissioner's case No. 14381, which is an appeal from final orders of the Tax Commissioner assessing taxes for the tax years 1945 and 1946, respectively, on certain towboats and barges of the appellant, the then finished and operating Houdry catalytic cracking unit above referred.

to and certain machinery and equipment in process of construction which were unfinished and not in operation on January 1, 1945, and January 1, 1946.

The decision of the Board of Tax Appeals affirmed in most respects the orders and assessments in each of these causes, and the appellant, by appeal to this court, presents the question whether the decision of the Board of Tax Appeals is unreasonable or unlawful.



[fol. 741] IN THE SUPREME COURT OF OHIO

OPINION, PER MATTHIAS, J.

Messrs. McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett and *Mr. Rufus S. Day, Jr.*, for appellant.

Mr. Herbert S. Duffy, attorney general, and *Mr. Donald B. Leach*, for appellee Tax Commissioner.

MATTHIAS, J.:

The appellant has assigned numerous errors with respect to each of the two appeals considered by the Board of Tax Appeals and which the board determined adversely to appellant. These assignments have been summarized in the brief of the appellant and will be discussed in the order therein stated.

The first questions of law presented are: Did the state of Ohio have jurisdiction, under Section 5325, General Code, to assess taxes for the years 1945 and 1946 upon certain boats and barges of the company which were not in use in Ohio and the use of which in waters bordering on Ohio was insubstantial, and is such assessment violative of the Fourteenth Amendment of the Constitution of the United States?

The record discloses that in its 1945 personal property tax return the appellant listed three towboats and 31 barges at a depreciated book value of $1,017,518, and in 1946 listed boats and barges having a depreciated book value of $726,733. The Tax Commissioner on audit raised the valuation of the boats and barges for 1945 to a true value of $1,322,863 and raised the valuation for 1946 to a true value of $1,-

303,907. Thereafter, within time, the appellant filed its application for review and redetermination for 1945 and 1946, contending, first, that its crude oil boats and barges, which carried crude oil from various points on the Mississippi river, up the Mississippi and Ohio rivers, to points in Indiana and Kentucky, were not taxable in Ohio under Section 5325, General Code, for the reason that they were not used in Ohio and their use in waters bordering on Ohio was [fol. 742] insubstantial and, therefore, taxation of these boats and barges by the state was violative of the due process clause of the Fourteenth Amendment of the United States Constitution.

The crude oil boats and barges involved constituted the greater part of the valuation upon which the taxes assessed were based. The remainder of the assessed value represented gasoline boats and barges engaged in transporting gasoline to various points in Ohio. These latter boats and barges are not involved in the controversy.

The contentions of the appellant were rejected in their entirety by the Tax Commissioner on review and redetermination. Upon appeal the Board of Tax Appeals held that, under Section 5325, General Code, with the exception of one small boat valued at $3,500, the oil boats and barges of the appellant were taxable in Ohio. The board announced that, being an administrative tribunal, it had no jurisdiction to decide the constitutional question presented.

The facts upon which the appellant bases its claim of want of jurisdiction of the state to levy such tax are as follows:

These crude oil boats and barges, during 1944 and 1945, were engaged in transporting oil from various points on the lower Mississippi river to Mount Vernon, Indiana, and Bromley, Kentucky. The crude oil unloaded at Mount Vernon, Indiana, was moved from that point by pipe line to various destinations, and the oil unloaded at Bromley, Kentucky, was likewise moved to the appellant's refinery at Latonia, Kentucky.

The appellant introduced evidence to show the number of miles traversed and the number of barrels of oil carried by each boat on each routing during the years 1944 and 1945. This evidence showed that the greater bulk of the operation

of these boats during each year was over three routes—[fol. 743] Memphis, Tennessee, to Mount Vernon, Indiana, Memphis, Tennessee, to Bromley, Kentucky, and Baton Rouge or Gibson, Louisiana, to Bromley, Kentucky; and that of the total river-route mileage traversed by the appellant's crude oil boats and barges from the lower Mississippi river to Bromley, Kentucky, only 17½ miles was through waters bordering on the state of Ohio.

In an attempt to arrive at a percentage figure the appellant computed these activities on a basis of "barrel miles" (number of miles multiplied by number of barrels carried) and found that the percentage of barrel miles on the portion of the river bordering on Ohio was, in 1944 and 1945, 1.27 per cent of the total barrel miles. It is claimed that none of the barrel miles was actually within the state of Ohio since its border is low water mark on the Ohio side of the river and the boats and barges were operated south of the border.

These crude oil boats and barges were registered from Cincinnati but, except for short stops for food, fuel or minor repairs, never were docked at Cincinnati, all repairs being made at Paducah, Kentucky, St. Louis, Missouri, or some other down-river point. No cargoes were ever taken on at Cincinnati during the years 1944 and 1945.

The appellant contends that, even if the company's crude oil boats and barges were constitutionally within Ohio's jurisdiction, Section 5325, General Code, should not be so construed as to authorize taxation thereof.

Section 5328, General Code, provides in part as follows:

"All ships, vessels and boats, and shares and interests therein, defined in this title as 'personal property,' belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in [fol. 744] business wholly in another state, shall be subject to taxation."

Section 5325, General Code, defines "personal property" as follows:

"* * * every ship, vessel, or boat, of whatsoever name or description, used or designed to be used either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is

within the jurisdiction of this state or elsewhere, and whether it has been enrolled, registered, or licensed at a collector's office, or within a collection district within this state, or not."

The appellant contends that its boats would be taxable in Ohio only if they were "used or designed to be used exclusively or partially in navigating any waters within or bordering on this state"; that, since the boats and barges were being used exactly as "designed," the only question under the statute is whether the actual use made of the boats and barges during the years in question brought them within the provisions of the statute.

The company contends that although this statute purports to tax boats operating in waters bordering on Ohio, it should not be construed to apply to boats whose use in waters within or bordering on Ohio was insubstantial. This contention is based upon the maxim, *de minimis non curat lex*. The decision of the Supreme Court of the United States in the case of *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S., 680, 90 L. Ed., 1515, 66 S. Ct., 1187, is cited in support of that contention. That case involved portal to portal pay.

Both the Tax Commissioner and the Board of Tax Appeals refused to adopt that interpretation of Section 5325, General Code. We quote from the decision of the Board of Tax Appeals:

"Section 5366, General Code, characterizes as 'taxable [fol. 745] property' all the kinds of property mentioned or referred to in the above quoted provisions of Section 5328, General Code. Section 5371, General Code, provides generally that personal property used in business shall be listed and assessed in the taxing district in which such business is carried on. This section, however, further provides as follows:

"'Ships, vessels, boats and aircraft, and shares and interests therein, shall be listed and assessed in the taxing district in which the owner resides.' Inasmuch as it appears that at all of the times here in question these boats and barges were used in part in navigating the waters of the Ohio river bordering on this state, such boats and barges as the property of the appellant, an Ohio corporation having

its domicile in this state, were clearly taxable under the expressed terms of the above noted statutory provisions."

We are in accord with that statement for it clearly appears that under the facts disclosed by the record such crude oil boats and barges were not used exclusively in another state and, therefore, came within the provisions of Section 5328, General Code.

Since these crude oil boats and barges came within the provisions of Sections 5325 and 5328, General Code, the contention of the appellant that the boats and barges were not within the jurisdiction of the state of Ohio for tax purposes becomes pertinent. The appellant contends that tangible personal property is not constitutionally subject to multiple taxation and, therefore, is taxable only by the state in which it has its situs. Further, appellant contends that under the decision of the Supreme Court of the United States in the recent case of *Ott, Commr.*, v. *Mississippi Valley Barge Line Co.*, 336 U. S., 169, 93 L. Ed., 585, 69 S. Ct., 432, river boats are subject to taxation only in accordance with the rule of proportionate taxation heretofore applied in the taxation of the rolling stock of railroads. [fol. 746] This contention requires an examination of that case for if it is applicable to the boats and barges owned by the appellant, there is now no provision in the laws of Ohio under which they may be taxed.

The facts in the *Ott case, supra,* are set forth in the opinion, as follows:

"Appellees are foreign corporations which transport freight in interstate commerce up and down the Mississippi and Ohio rivers under certificates of public convenience and necessity issued by the Interstate Commerce Commission. Each has an office or agent in Louisiana but its principal place of business is elsewhere. The barges and towboats, which they use in this commerce are enrolled at ports outside Louisiana; but they are not taxed by the states of incorporation.

"In the trips to Louisiana a tugboat brings a line of barges to New Orleans where the barges are left for unloading and reloading. Then the tugboat picks up loaded barges for return trips to ports outside that state. There is no

fixed schedule for movement of the barges. But the turnarounds are accomplished as quickly as possible with the result that the vessels are within Louisiana for such comparatively short periods of time as are required to discharge and take on cargo and to make necessary and temporary repairs.

"Louisiana and the city of New Orleans levied ad valorem taxes under assessments based on the ratio between the total number of miles of appellees' lines in Louisiana and the total number of miles of the entire line. The taxes were paid under protest and various suits, which have been consolidated, were instituted in the District Court by reason of diversity of citizenship for their return, the contention being that the taxes violated the due process clause of the Fourteenth Amendment and the commerce clause.

"Following the citation and analysis of the cases wherein [fol. 747] the court had evolved the rule that vessels are taxable solely at the domicile of the owners, save where they had acquired an actual situs elsewhere, the Supreme Court of the United States concluded as follows:

"We see no practical difference so far as either the due process clause or the commerce clause is concerned whether it is vessels or railroad cars that are moving in interstate commerce. The problem under the commerce clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U. S., 362, 365 [, 84 L. Ed., 1254, 1255, 60 S. Ct. 968]. So far as due process is concerned the only question is whether the tax in actual operation has relation to opportunities, benefits, or protections conferred or afforded by the taxing state. See *Wisconsin* v. *J. C. Penny Co.*, 311 U. S., 435, 444 [, 85 L. Ed., 267, 270, 61 S. Ct., 246, 130 A. L. R., 1229]. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the state.

"There is such an apportionment under the formula of the *Pullman case*. Moreover, that tax, like taxes on property, taxes on activities confined solely to the taxing state, or taxes on gross receipts apportioned to the business carried on there, has no cumulative effect caused by the interstate character of the business. Hence there is no risk of

multiple taxation. Finally, there is no claim in this case that Louisiana's tax discriminates against interstate commerce. It seems therefore to square with our decisions holding that interstate commerce can be made to pay its way by bearing a nondiscriminatory share of the tax burden which each state may impose on the activities or property within its borders. See *Western Live Stock* v. *Bureau of Revenue*, 303 U. S., 250, 254, 255 [, 82 L. Ed., 823, 826, [fol. 748] 827, 58 S. Ct., 546, 115 A. L. R., 944] and cases cited. We can see no reason which should put water transportation on a different constitutional footing than other interstate enterprises."

As hereinbefore stated, the question before the Supreme Court of the United States in the *Ott* case was whether the state of Louisiana and the city of New Orleans could levy ad valorem taxes based upon a mileage percentage figure. The appellant in the instant case contends that that decision has the effect of substituting a new formula for the long established rule of taxation whereby states, wherein the owners of watercraft are domiciled, can tax such boats to their full value as other personal property so owned is taxed. It is to be noted, however, that this conclusion must be reached by inference from the language used in the *Ott* case. It is not within the scope of the facts there presented or the decision rendered thereon.

Other recent decisions of the Supreme Court of the United States are more directly in point; cases in which that court recognized the right of the domiciliary state to levy the full ad valorem tax on personal property passing through other states in interstate commerce.

In the case of *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S., 292, 88 L. Ed., 1283, 64 S. Ct., 950, the question presented was stated by Mr. Justice Frankfurter as follows:

"The question before us is whether the commerce clause or the due process clause of the Fourteenth Amendment bars the state of Minnesota from enforcing the personal property tax it has laid on the entire fleet of airplanes owned by the petitioner and operated by it in interstate transportation. The answer involves the application of settled legal principles to the precise circumstances of this case. To these, about which there is no dispute, we turn."

[fol. 749] The pertinent facts therein were as follows:

"Northwest Airlines is a Minnesota corporation and its principal place of business is St. Paul. It is a commercial airline carrying persons, property and mail on regular fixed routes, with due allowance for weather, predominantly within the territory comprising Illinois, Minnesota, North Dakota, Montana, Oregon, Wisconsin and Washington. For all the planes St. Paul is the home port registered with the Civil Aeronautics Authority, under whose certificate of convenience and necessity Northwest operates. At six of its scheduled cities, Northwest operates maintenance bases, but the work of rebuilding and overhauling the planes is done in St. Paul. Details as to stopovers, other runs, the location of flying crew bases and of the usual facilities for aircraft, have no bearing on our problem.

"The tax in controversy is for the year 1939. All of Northwest's planes were in Minnesota from time to time during that year. All were, however, continuously engaged in flying from state to state, except when laid up for repairs and overhauling for unidentified periods. On May 1, 1939, the time fixed by Minnesota for assessing personal property subject to its tax (Minn. Stat. 1941, Section 273.01), Northwest's scheduled route mileage in Minnesota was 14% of its total scheduled route mileage, and the scheduled plane mileage was 16% of that scheduled. It based its personal property tax return for 1939 on the number of planes in Minnesota on May 1, 1939. Thereupon the appropriate taxing authority of Minnesota assessed a tax against Northwest on the basis of the entire fleet coming into Minnesota. For that additional assessment this suit was brought. The Supreme Court of Minnesota, with three judges dissenting, affirmed the judgment of a lower court in favor of the state. [*State* v. *Northwest Airlines, Inc.*,] 213 Minn., 395, 7 N. W. [fol. 750] (2d), 691. A new phase of an old problem led us to bring the case here. [*Northwest Airlines, Inc.* v. *Minnesota*,] 319 U. S. 734 [, 87 L. Ed. 1695, 63 S. Ct. 1031]."

In holding that the state of Minnesota was authorized to levy a tax upon "all personal property of persons residing therein, including the properties of corporations," the court reviewed its decisions in previous cases and held that the

doctrine of tax apportionment for instrumentalities engaged in interstate commerce introduced in *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 35 L. Ed. 613, 11 S. Ct. 876, was inapplicable. Relying on the case of *People, ex rel. New York Central & Hudson River Rd. Co.* v. *Miller*, 202 U. S. 584, 50 L. Ed. 1155, 26 S. Ct. 714, the court stated:

"Here, as in that case, a corporation is taxed for all its property within the state during the tax year none of which was 'continuously without the state during the whole tax year.' * * * The fact that Northwest paid personal property taxes for the year 1939 upon 'some proportion of its full value' as its airplane fleet in some other state does not abridge the power of taxation of Minnesota as the home state of the fleet in the circumstances of the present case."

It is to be noted that the *Northwest Airlines case* was mentioned in the opinion in the *Ott case*, but it was neither modified nor limited in any way. In its essential facts the *Northwest Airlines case* is similar to the instant case. It involved a tax by the domiciliary state whereas the *Ott case* involved the validity of a tax by a state other than the domiciliary state. We do not believe the *Northwest Airlines case* and the *Ott case* are in conflict. The Supreme Court of the United States applied the rule to the taxation of tangible personal property which it had theretofore applied to the taxation of intangible persona. property, that [fol. 751] is, that such property may be taxed both at its domiciliary situs and at the place where it had acquired a business situs.

It is pertinent to note that in the instant case we are not considering the taxation of the property of a public utility engaged in interstate transportation but rather the taxability of property of a domestic corporation which operated both within and beyond the limits of this state. Further, since the company here is not a public utility, there is no provision under the statutes of this state for the establishment of any mileage, barrel mileage, time period or other arbitrary classification, and this court is entirely without authority to select any apportionment method and adopt it as the correct applicable principle. That is purely a legislative function and, as hereinbefore stated, if the tax

levied is unconstitutional it follows that there is no liability therefor whatever. The record does not disclose that any other state taxed these boats and barges, although there is an inference that Kentucky is now asserting its right to do so. We conclude that the levying of the tax in question was not violative of the Fourteenth Amendment of the Constitution.

We come now to the question of machinery and equipment in process of construction.

The company included no machinery in process of construction in its personal property tax returns for the years 1943, 1944, 1945 and 1946, claiming such property was not taxable. The Tax Commissioner, on audit for those years, found such machinery to be taxable and added to the assessment certificate for 1943 and 1944 the value, at book cost, of the unfinished Houdry catalytic cracking plant, assessed the machinery in each of those years at 50 per cent of cost and allowed a further reduction in book cost of 12 per cent, because he found that book cost exceeded the "true value" by such percentage,

[fol. 752] The unfinished Houdry plant was the only machinery in process of construction involved in the 1943 and 1944 assessment, and the plant was completed by January 1, 1945. However, in the tax years 1945 and 1946, the company had other machinery, the bulk of which constituted an unfinished thermal gas plant located at Cleveland. The Tax Commissioner added these to the tax assessment certificate for the years 1945 and 1946, valuing them at 50 per cent of the book value.

The company contends that such machinery was not taxable in any of those years and that the Houdry plant should have been given a reduced valuation by reason of the excessive cost of construction on account of war emergency conditions existing at the time of the erection of that plant and of obsolescence.

The Tax Commissioner held that the machinery in process of construction was "used in business" within the definition of that term in Section 5325-1, General Code. The pertinent part of that section reads as follows:

"Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered

to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise * * *"

The Board of Tax Appeals held that the clause, "when kept and maintained as a part of a plant capable of operation, whether actually in operation or not," covers machinery in process of construction.

The company and the Tax Commissioner are in disagreement as to the meaning of the words, "kept," "maintained" and "part of a plant capable of operation," disclosing that the limited language used in this [fol. 753] section in defining "used in business" requires our consideration.

It is the contention of the company that the words, "kept and maintained," as applied to the machinery herein, contemplate machinery completed and operative, since machinery is not maintained until it first has been completely constructed. The Tax Commissioner ascribes to the words a broader meaning which includes retaining possession of the machinery, and asserts that its retention and prevention of corrosion and other deterioration constitute "maintaining" within the definition of the term.

Much more divergence of view occurs when the parties hereto define the word, "plant." The company defines the word, "plant," as including only the Houdry catalytic cracking plant and the Thermal cracking plant and claims that, since each of these, of itself, was machinery in process of construction for the tax years in question, it necessarily could not be "part of a plant capable of operation," for it was not completed.

In the view of the Tax Commissioner the "plant" consisted of the entire operating refinery and included its many operating units among which were the Houdry catalytic cracking plant and the Thermal cracking plant, and consequently these units, even while under construction, were parts of a "plant capable of operation."

The Board of Tax Appeals, in construing Section 5625-1, General Code, *supra* made the following observation:

"It is to be observed however that the above noted provisions of Section 5325-1, General Code, were not enacted with special reference to either appellant's refineries at Cleveland or elsewhere or to petroleum refineries generally [fol. 754] in this state. And in this view recognition must be given to the general definition that in an industrial or commercial sense, a 'plant' includes real estate and all else that represents capital invested in the means of carrying on a business, exclusive of raw material or the manufactured product. This leads to the conclusion that as to the refinery property of the appellant each refinery as a whole at its location in Cleveland or elsewhere is 'a plant' within the meaning of Section 5625-1, General Code. Inasmuch as each unfinished item or [*sic*] machinery and equipment here in question was a part of a refinery or 'plant' capable of operation and in actual operation and was kept and maintained as such, it was property 'used' and 'used in business' within the meaning of the taxing statutes here under consideration."

In our view such application of Section 5625-1, General Code, is in accord with the well established rule that words of a statute, in common use or other than terms of art or science, will be construed in their ordinary acceptation and significance and with the meaning commonly attributed to them. *Mutual Bldg. & Investment Co.* v. *Efros*, 152 Ohio St., 369, 89 N. E. (2d), 648.

The following statement from 37 Ohio Jurisprudence, 546, Section 290, is pertinent:

"Courts should be slow to impart any other than their natural and commonly understood meaning to terms employed in the framing of a statute. Too narrow a construction of terms is not favored. Statutory phraseology should not be given an unnatural, unusual, strained, arbitrary, forced, artificial, or remote meaning which may, in its last analysis, be technically correct but wholly at variance with the common understanding of men. A technical construction of words in common use is to be avoided."

We hold that the decision of the Board of Tax Appeals that the Houdry catalytic cracking plant and the Thermal [fol. 755] cracking plant, although under construction, constituted machinery "kept and maintained as a part of a plant capable of operation" was not unreasonable or unlawful.

Having determined that the Houdry plant, with other machinery, was subject to taxation while in the process of construction, the question directly presented is whether the valuation thereof by the commissioner, as corrected and modified by the Board of Tax Appeals, constituted the true value thereof.

The principal contention of the company as to assessed value relates to the Houdry catalytic cracking plant. That plant was a war project and was constructed to produce aviation gasoline much needed during the war, and because of the urgent need for and shortage of such fuel the company necessarily expended large sums of money in overtime wages and for required materials with a result that the plant cost $2,419,102.76 more to construct than the estimate furnished by the construction company. Both the company and the Tax Commissioner agree that the part of such "overrun," or excessive cost of construction, which did not add value to the property, should be eliminated from the assessed value thereof. The difference between the parties in that regard is primarily one of fact—the company urging that the amount of "overrun" should be $1,423,852, whereas the Tax Commissioner held it to be $977,777.

On appeal, the Board of Tax Appeals fixed the amount of such excess costs at $1,200,000. The company contends that, on a percentage basis, the book value should be reduced by 15.64 per cent. The Board of Tax Appeals made this percentage 13.18 per cent of cost. These figures, of course, involve the value of the plant as completed but are likewise applicable to the plant when under construction in 1943 and 1944. These percentages were used by the Board of Tax [fol. 756] Appeals, together with a depreciation allowance for the years it was used after completion, resulting in a valuation for tax year 1943 at $377,58[illegible] 1944, $5,399,459, 1945, $6,593,502 and 1946, $5,899,439.

The company contends that the figure arrived at by the Board of Tax Appeals not only failed to give sufficient

allowance for the excess cost of construction or "overruns" but also made inadequate allowance for obsolescence of the Houdry catalytic cracking plant which it contends became partially obsolete at the termination of the war because the process of catalytic cracking had been replaced by more efficient methods.

The Houdry plant consisted of several units, which were a six-case unit, a three-case unit and foundations for another three-case unit which has never been constructed. The record discloses that the three-case unit was originally built as a special attachment to the six-case basic Houdry unit to assist the six-case unit in producing as large a quantity of high octane gasoline as possible during the war. Its function was to treat oil, which had been partly processed in the six-case unit, in such manner as to step up its octane rating for aviation purposes. That use terminated with the war, and the only use of the three-case unit during the year 1946 was in the manufacture of motor gasoline.

The record discloses that the three-case unit was inefficient in operation, not yielding as large a percentage of motor fuel from the oil processed as the larger regularly designed unit, resulting in a higher cost of operation.

The company claims that in the year 1946 it was entitled to a deduction from the value of this Houdry plant in the sum of $1,292,077 for obsolescence of the three-case unit and for the foundation of the three additional cases which were never built. The Board of Tax Appeals did regard the base for the additional cases as to some extent idle [fol. 757] equipment and consequently reduced the value thereof from $135,000 to $13,500, but refused to allow any reduction by reason of the claimed obsolescence of the three-case unit. The board considered it as a part of the Houdry catalytic cracking plant as a whole and as an operating unit thereof and applied to it the same rate of reduction for depreciation and overrun as were determined applicable to the remainder of the plant.

Evidence in the record supports the determination of the Board of Tax Appeals that the "overruns" totaled $1,200,000, and its decision in that respect was not unreasonable or unlawful. However, the refusal of the Board of Tax Appeals to make some allowance for obsolescence of the three-case unit was unreasonable and unlawful in that the Board

of Tax Appeals failed to apply the principles established by this court in the case of *B. F. Keith Columbus Co.* v. *Board of Revision of Franklin County*, 148 Ohio St., 253, 74 N. E. (2d), 359. The syllabus of that case provides as follows:

"1. In determining the value of property for the purpose of taxation, the assessing body must take into consideration all factors which affect the value of the property.

"2. Functional depreciation occurs where property, although still in good physical condition, has become obsolete or useless due to changing business conditions and thus for all practical considerations is of little or no value to the owner of such property.

"3. Where the evidence shows that, due to a change of business conditions, property has become obsolete, it is unreasonable for the assessing body not to consider this factor of functional depreciation in arriving at the tax value."

The facts in regard to the limited use of this three-case [fol. 758] unit were not in dispute and require some allowance for the disclosed obsolescence. The failure of the Board of Tax Appeals to make such determination renders their decision as to the value of the Houdry plant for the year 1946 unreasonable and unlawful and requires a reversal of the order in that regard and a remand to the board for the redetermination of the correct true value of such plant for the year 1946.

At the conclusion of the proceeding before the Board of Tax Appeals, an application for rehearing was filed by the company wherein it protested the failure of the board to reduce the value of the machinery and equipment in the full amount of the excess valuation theretofore determined by it.

For the year 1945 the company failed to file a claim for deduction from book value (form 902) for the taxable property of the company, as disclosed by its inter-county return, so that, when the machinery in processs of construction (the thermal plant) was added to the return, the sum of all the property listed exceeded the book values originally returned in the inter-county tax return by the sum of $561,027.

When the Tax Commisioner determined that the excess cost of construction or "overrun" on the Houdry plant was

$988,000, he allowed only the sum which the true valuations as determined exceeded the listed book values, or a reduction in the sum of $561,027. The company contends that since all such property was in Cuyahoga county wherein the true value of the property found exceeded the book value by the sum of $900,002, the latter sum should have been allowed.

However, the company having concededly paid taxes on a basis in excess of the book values of personal property in Cuyahoga county as stated in its inter-county tax return, the Board of Tax Appeals held that as to the year 1945 any question of reducing the assessed tax values below those on [fol. 759] which the company had paid the tax was moot and should not be considered, and allowed no reduction.

The company contends that the payment of the tax on the higher basis shown by the return did not render the question involved moot, but on the contrary the reduction should have been allowed because the classified tax law permits the refund to a taxpayer of a tax he has already paid but which, on appeal, is held not to have been owed. That contention is based on the provisions of Section 5395, General Code, which provides in part as follows:

"Excepting as to any taxable property concerning the assessment of which an *appeal has been filed* under Section 5611 of the General Code, the Tax Commissioner may finally assess the taxable property required to be returned by any taxpayer * * * for any prior year or years within the time limited therefor in Section 5377 of the General Code * * *." (Emphasis supplied.)

The Board of Tax Appeals in its decision admits, in effect, that the taxpayer was entitled to a reduction in valuation in the sum of $900,002, but states, in effect, that, because the appeal was determined after the time for issuance of the final assessment certificate by the Tax Commissioner had expired and the tax had been paid, such reduction would be ineffective. The payment of the tax when due to avoid interest and penalties and when accompanied by a proper appeal protects all the taxpayer's rights until all administrative and judicial review thereof is completed.

Where a taxpayer is required by law to file an inter-county return he is not thereby precluded from claiming

the rights of a taxpayer filing a return in a single county. (*Wright Aeronautical Corp.* v. *Glander, Tax Commr.*, 151 Ohio St., 29, 84 N. E. [2d], 483, distinguished.)

[fol. 760] CONCURRING OPINION, PER TAFT, J.

The decision of the Board of Tax Appeals is not unreasonable or unlawful except as to its refusal to make proper allowance for obsolescence in the year 1946 and its refusal to grant the taxpayer proper reduction to book values for the year 1945 as above indicated.

The cause is accordingly remanded to the Board of Tax Appeals for further proceeding in accordance with this opinion.

Decision affirmed in part and reversed in part

Weygandt, C. J., Zimmerman and Hart, JJ., concur.

Stewart and Taft, JJ., concur, except in paragraph two of the syllabus and the portion of the opinion relating thereto.

Middleton, J., not participating.

TAFT, J., concurring:

I have considerable doubt about paragraph two of the syllabus. However, I reach the same result on another ground. The Houdry plant, even before it was "capable of operation," was at that time "acquired or held as means or instruments for carrying on the business" within the meaning of the words found in Section 5325, General Code. At that time, the Houdry plant might not be so "held" but it was so "acquired." The words "acquired or held" are in the disjunctive.

Stewart, J., concurs in the foregoing concurring opinion.

[fol. 761] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

No. 32,060

[Title omitted]

CERTIFICATE AS TO THE COURT'S INTENT TO HOLD SECTIONS 5323 AND 5325 GENERAL CODE OF OHIO TO BE VALID AND NOT REPUGNANT TO THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES—Filed May 22, 1951

The Supreme Court of Ohio hereby certifies that, when it held, in the first syllabus of its decision in the above case, that Sections 5328 and 5325 of the General Code:

> "* * * authorized the taxation, at their true value, of boats and barges owned by an Ohio corporation and operated partly on the Mississippi River and partly on the waters of the Ohio River adjacent to the State of Ohio,"

and that:

> [fols. 762-765] "The tax levied on such boats and barges, pursuant to such statutory provisions, is not violative of the provisions of the Fourteenth Amendment of the Constitution of the United States",

it intended thereby, as evidenced by this court's opinion in the case, to hold that the said statutes required boats and barges so owned and operated to be taxed at their true value, and that as so construed said statutes were valid and in no respect violative of or repugnant to the Fourteenth Amendment of the Constitution of the United States.

The court further certifies that the appellant in its briefs and in its oral argument before this court contended that said statutes, as so construed, were invalid on the ground that they were repugnant to the Fourteenth Amendment of the Constitution of the United States and that appellee in its brief and oral arguments contended the contrary. This court further certifies that it rejected appellant's contention and sustained the validity of said statutes under the United States Constitution.

The court further certifies that its decision with respect to the taxability of appellant's boats and barges for the years 1945 and 1946 is a final judgment of this court, and that the remand of the case to the Board of Tax Appeals leaves only ministerial acts to be performed by said Board and the Tax Commissioner of Ohio in accordance with this court's decision.

It is hereby ordered that this certificate which is concurred in by all of the Judges of the court, be made part of the record in this case.

Carl Weygandt, Chief Justice, 5/22/51.

[fol. 766] [File endorsement omitted]

[Title omitted]

APPLICATION FOR SUBSTITUTION OF APPELLEES—Filed June 7, 1951

To: The Honorable Chief Justice and Judges of the Supreme Court of Ohio:

Your applicant, The Standard Oil Company, appellant in the above enttiled cause, respectfully requests that John W. Peck, at present Tax Commissioner of Ohio, successor in office to C. Emory Glander, former Tax Commissioner of Ohio, be substituted as appellee in the place and stead of C. Emory Glander, Tax Commissioner, in the above entitled cause; and your applicant respectfully requests that John J. Carney, at present Auditor of Cuyahoga County, Ohio, successor in office to John A. Zangerle, former Auditor of Cuyahoga County, Ohio, be substituted, as appellee in the place and stead of John A. Zangerle, Auditor, in the above entitled cause.

The Standard Oil Company, By McAfee, Grossman, Taplin, Hanning; Newcomer & Hazlett, Its Attorneys.

Of Counsel: Isador Grossman, Rufus S. Day, Jr., H. V. E. Mitchell.

[fol. 767] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

NOTICE OF APPLICATION—Filed June 7, 1951

To: Robert Leach, Assistant Attorney General, Office of the Attorney General, State House Annex, Columbus 15, Ohio.
To: Frank T. Cullitan, Prosecuting Attorney for Cuyahoga County, Ohio, Criminal Courts Building, Cleveland 14, Ohio.

Please take notice that The Standard Oil Company, appellant in the above entitled cause, has deposited this day in the United States mails for delivery to the office of the Clerk of the Supreme Court of Ohio in due course of mail the above application for substitution of parties appellee in the above entitled cause and that the appellant will cause said application to be brought before the Honorable Chief Justice Carl V. Weygandt and the Supreme Court of Ohio at 2:00 o'clock p.m. on Thursday, June 7, 1951, or as soon thereafter as the Supreme Court may conveniently hear the same, in the Supreme Court of Ohio, State Capitol, Columbus, Ohio.

The Standard Oil Company. By McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett, Its Attorneys.

[fols. 768-770] PROOF OF SERVICE (omitted in printing)

[fol. 771] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed July 16, 1951

Appellant adopts for its statement of points upon which it intends to rely in its appeal to this Court the points contained in its Assignment of Errors heretofore filed.

Appellant designates the following portions of the record herein for printing by the Clerk of this Court:

1. Petition for Appeal from the Supreme Court of Ohio (Record, pages 1, 2).*

2. Order Allowing Appeal (Record, pages 3, 4).

[fol. 772] 3. Assignment of Errors and Prayer for Reversal (Record, pages 5, 6).

4. Proof of Service on John W. Peck, Tax Commissioner (Record, page 94).

5. Proof of Service on John J. Carney, Auditor of Cuyahoga County (Record, page 96).

6. Notice to Appellee, John J. Carney (Record, page 97).

7. Notice to Appellee, John W. Peck, Tax Commissioner (Record, page 98).

8. Precipe for Transcript of Record (Record, pages 101 to 103, inclusive).

9. Precipe for Transcript of Record with Acknowledgment of Service and Waiver of Right of Filing Counter-Precipe by Attorneys for John W. Peck, Tax Commissioner (Record, pages 104 to 106, inclusive).

10. Docket and Journal Entries of Supreme Court of Ohio (Record, pages 114 to 119, inclusive).

11. Notice of Appeal to Supreme Court of Ohio (Record, pages 120 to 172, inclusive).

12. From Volume I of the Record in the Supreme Court of Ohio entitled "Proceedings before the Board of Tax Appeals", only the following:

(a) Pages 18 to 37, inclusive, of such Volume (Record, pages 198 to 217, inclusive).

(b) Page 46 through page 48, line 15, of said Volume. (Record, pages 226 through 228, line 15).

(c) Page 52 through page 54, line 5, of said Volume (Record page 232 through page 234, line 5).

(d) Page 57, line 22, through page 94, of said Volume (Record, page 237, line 22, through page 274).

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* References are to pages of the record as numbered in red by the Clerk of the Supreme Court of Ohio.

18. From Volume II of the Record in the Supreme Court of Ohio entitled "Proceedings before the Board of Tax Appeals" only the following:

(a) Pages 28 through 31 of said Volume (Record, pages 575 through 578).

[fol. 773] (b) Pages 103 through 106 of said volume (Record, pages 644 through 647).

(c) Appellant's Exhibit 1, page 109 of said Volume (Record, page 650).

(d) Appellant's Exhibit 2, page 111 of said Volume (Record, page 651).

14. Opinion of the Supreme Court of Ohio (Record, pages 738 to 760, inclusive).

15. Certificate of the Supreme Court of Ohio as to its intent to hold Sections 5328 and 5325, General Code of Ohio, to be valid and not repugnant to the Fourteenth Amendment of the Constitution of the United States (Record, pages 761, 762).

16. Application for Substitution of Appellees (Record, page 766).

17. Notice of Application (Record, page 767, 768).

Isador Grossman, Rufus S. Day, Jr., H. V. E. Mitchell, Attorneys for Appellant.

Proof of Service

Service on Appellees of Appellant's Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed is hereby acknowledged by the undersigned, Attorney for Appellees, this 11th day of July, 1951.

Isadore Topper, Attorney for Appellees.

[File endorsement omitted.]

[fol. 774] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

[Title omitted]

ORDER—Filed October 8, 1951

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

(8270)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 184

THE STANDARD OIL COMPANY, AN OHIO CORPORATION,
Appellant,

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO, AND JOHN J. CARNEY, AUDITOR OF CUYAHOGA COUNTY, OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT AS TO JURISDICTION

ISADOR GROSSMAN,
RUFUS S. DAY, JR.,
H. V. E. MITCHELL,
Counsel for Appellant.

McAFEE, GROSSMAN, TAPLIN, HANNING,
NEWCOMER & HAZLETT,
Of Counsel.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provision sustaining jurisdiction	1
Statutes of Ohio, the validity of which is involved	2
Date of judgment and date of application for appeal	3
Nature of case and rulings below	4
Substantiality of questions involved	10
Exhibit "A"—Certificate of Supreme Court of Ohio	14
Exhibit "B"—Opinion of the Supreme Court of Ohio	16
Exhibit "C"—Opinion and entry of the Board of Tax Appeals of Ohio	36
Exhibit "D"—Entry of the Tax Commissioner of Ohio—1945	65
Exhibit "E"—Entry of the Tax Commissioner of Ohio—1946	69

Table of Cases Cited

Curry v. *McCanless*, 307 U. S. 357	11
Northwest Air Lines, Inc., v. *Minnesota*, 322 U. S. 292	8, 12
Ott v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169	8
Reeves v. *Island Creek Fuel & Transportation Co.*, 230 S. W. (2d) 924	13
Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194	11

Statutes Cited

Constitution of the United States, 14th Amendment	8
General Code of Ohio:	
Section 5325	2, 8, 9
Section 5328	2, 8, 9
United States Code, Title 28, Section 1257	2

IN THE SUPREME COURT OF OHIO

No. 32,060

THE STANDARD OIL COMPANY, AN OHIO CORPORATION,
Appellant,

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO (SUBSTITUTED FOR C. EMORY GLANDER, FORMER TAX COMMISSIONER OF OHIO),

AND

JOHN J. CARNEY, AUDITOR OF CUYAHOGA COUNTY (SUBSTITUTED FOR JOHN A. ZANGERLE, FORMER AUDITOR OF CUYAHOGA COUNTY),

Appellees

STATEMENT IN SUPPORT OF JURISDICTION

The Standard Oil Company, an Ohio corporation, appellant herein, in support of the jurisdiction of the Supreme Court of the United States to review the above-entitled case on appeal, respectfully represents:

A

Statutory Provision Sustaining Jurisdiction

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is

Section 1257 of Title 28 of the United States Code, which provides as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

B

Statutes of Ohio, the Validity of Which Is Involved

The statutes of the State of Ohio, the validity of which has been sustained by final judgment of the Supreme Court of Ohio, the highest court of the State, as not being violative of or repugnant to the Constitution and laws of the United States, are Sections 5328 and 5325 of the General Code of Ohio. These sections read as follows:

> "Sec. 5328. *Property to be entered on general tax list and duplicate.*—All real property in this state shall be subject to taxation, except only such as may be expressly exempted therefrom. All personal property located and used in business in this state and all

domestic animals kept in this state, whether used in business or not shall be subject to taxation, regardless of the residence of the owners thereof. All ships, vessels and boats, and shares and interests therein, defined in this title as 'personal property,' belonging to persons residing in this state, and aireraft belonging to persons residing in this state and not used in business wholly in another state, shall be subject to taxation. All property mentioned in this section shall be entered on the general tax list and duplicate of taxable property as prescribed in this title."

"Sec. 5325. *'Personal property' defined.*—The term 'personal property' as so used, includes every tangible thing being the subject of ownership, whether animate or inanimate, other than patterns, jigs, dies, drawings, money and motor vehicles registered by the owner thereof, and not forming part of a parcel of real property, as hereinbefore defined; also every share or portion, right or interest, either legal or equitable, in and to every ship, vessel, or boat, of whatsoever name or description, used or designed to be used either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere, and whether it has been enrolled, registered, or licensed at a collector's office, or within a collection district in this state, or not."

C

Date of Judgment and Date of Application for Appeal

The date of the final judgment of the Supreme Court of Ohio which is now sought to be reviewed was March 14, 1951, on which day the Supreme Court of Ohio delivered its opinion and entered its decision on its journal.

The date on which the Application for Appeal was presented to, and allowed by, the Chief Justice of the Supreme Court of Ohio was June 7, 1951.

D

Nature of Case and Rulings Below

Appellant is an Ohio corporation engaged primarily in producing, transporting, refining and marketing petroleum and its products. Its principal sources of crude oil are located in the southern and southwestern portions of the United States and its refineries are located in Ohio and Kentucky. During the period involved in this case appellant owned crude oil boats and barges which it employed in transporting oil from points on the lower Mississippi and Ohio Rivers to such points as Mt. Vernon, Indiana, and Bromley, Kentucky (R. I, 62 to 64).[1] The issue here involved is Ohio's right to tax the full value of these boats and barges under the following circumstances:

The great bulk of the operation of appellant's boats and barges during this period was on three regular routings: Memphis, Tennessee, to Mt. Vernon, Indiana; Memphis, Tennessee, to Bromley, Kentucky; and Baton Rouge or Gibson Landing, Louisiana, to Bromley, Kentucky, (R. I, 62)—Mt. Vernon, Indiana, and Bromley, Kentucky, being the two river terminals of appellant (R. I, 74, 75). The miles and "barrel miles" (number of miles multiplied by number of barrels of crude oil carried) traversed by each boat on each route during the period in question are shown on appellant's Exhibit 2 (R. II, 111).

Of the total river mileage traversed by appellant's boats and barges on any of their trips up the Mississippi and Ohio Rivers the maximum through waters bordering on Ohio was only 17½ miles. These 17½ miles were the 17½ miles of the Ohio River east of the Indiana-Ohio

[1] References are to volume and page number of the Record (R.) before the Ohio Supreme Court, which has been transmitted herewith.

border which the boats and barges had to traverse to get to Bromley, Kentucky, which is across the Ohio River from Cincinnati (R. I, 74, 76). Even these 17½ miles were not within the State of Ohio, since the southern border of Ohio is low water mark on the Ohio side of the river.

Thus, none of the regular operation of appellant's boats and barges was within Ohio, and only .7 of 1% of such operation on the mileage basis, or 1.27% thereof on the "barrel mile" basis was through waters which even bordered on Ohio (R. II, 111).

All major repairs of the boats and barges were made at Paducah, Kentucky, St. Louis, Missouri, or some other down-river point, and when they were dry-docked, they were dry-docked at these points (R. I, 79). The only time any of the boats or barges ever docked at an Ohio port during the years in question was when a boat, after discharging its cargo at Bromley, Kentucky, occasionally stopped at Cincinnati for a couple of hours for food, fuel or minor repairs, just as it frequently did at other ports farther south on the river. No cargo was ever unloaded or taken on at Cincinnati during the years in question (R. I, 84).

Appellant disclosed these boats and barges at a value of $1,017,518 in its Ohio Personal Property Tax Return for 1945, and at a value of $726,733 in its return for 1946. On audit, the Tax Commissioner of Ohio raised the value of the boats and barges to $1,322,863 for 1945 and to $1,303,907 for 1946 (see entries of Tax Commissioner for 1945 and 1946, attached hereto as Exhibits D and E, respectively).

In the Applications for Review and Redetermination which appellant filed with the Tax Commissioner of Ohio for each of the two years (R. II, 23, 98), appellant contended generally that the boats and barges should be eliminated from the assessments "because they are not subject to

personal property taxation under the laws of Ohio". Appellant did not in these applications contend specifically that taxation of the boats and barges would violate the Constitution of the United States, because the Tax Commissioner of Ohio had, under Ohio law, no authority to pass on the constitutionality of a statute.

However, after the Tax Commissioner had sustained the assessment of the boats and barges for both years, and appellant had appealed to the Board of Tax Appeals of Ohio, appellant, on October 18, 1948, filed for each of the years an identical "Amendment and Supplement to Notice of Appeal", contending that the boats and barges should be eliminated from the assessments (R. I, 37, 45). The grounds for this contention were stated as follows:

> "1. The taxation of such boats and barges by the State of Ohio for the year 1945 [1946] would violate the statutes of Ohio, since the use of such boats and barges in waters within or bordering on Ohio was insubstantial; and
>
> 2. The taxation of such boats and barges by the State of Ohio for the year 1945 [1946], even if permitted by the Ohio statutes, would deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, since such boats and barges had no taxable situs in Ohio for such year."

Thereafter, the case was heard and submitted to the Board of Tax Appeals upon the evidence and on the briefs and oral argument of counsel and on November 19, 1949 the Board made its entry, which is set forth in full as Appendix C hereof. So far as concerns the taxability of boats and barges, the Board first held unanimously that Sections 5328 and 5325 of the Ohio General Code specifically required the taxation of appellant's boats and barges, because they were used partly on waters bordering on Ohio, even though such

use was very slight. The Board then went on to hold, by a two to one vote, that it, like the Tax Commissioner, had no authority to pass on the constitutionality of the statute. The third member of the Board dissented on the ground that appellant's boats and barges were not "within Ohio" and that the Supreme Court of Ohio had previously held that there could be no taxation of property which was not within the state (R. I, 346).

On December 19, 1950, being within the time permitted by law, appellant filed its Notice of Appeal from the decision of the Board of Tax Appeals to the Supreme Court of Ohio. In its Assignment of Errors filed with the Supreme Court, appellant asserted (Assignments 2 and 3, B.T.A. Case No. 14,381, set forth in appellant's notice of appeal to the Supreme Court of Ohio):

> "2. The Board of Tax Appeals erred in failing to hold that the taxation of any of Appellant's crude oil boats and barges by the State of Ohio for the years 1945 and 1946 would violate the statutes of Ohio, in view of the fact that during such years such boats and barges were not used in Ohio, and their use in waters bordering on Ohio was insubstantial.
>
> 3. The Board of Tax Appeals erred in failing to hold that taxation of any of Appellant's crude oil boats and barges by the State of Ohio for the years 1945 and 1946, even if permitted by the Ohio statutes, would deprive Appellant of its property without due process of law in violation of the Fourteenth Amendment to the United States Constitution, since such boats and barges had no taxable situs in Ohio for either of such years."

On March 14, 1951 the Supreme Court of Ohio rendered its decision in this case. A copy of the court's syllabus and opinion is attached hereto as Exhibit B. As shown thereby, the court sustained the decision of the Board of Tax Appeals that taxation of appellant's boats and barges was

required by Sections 5328 and 5325 of the Ohio General Code. After reaching this conclusion, it proceeded to consider whether the statutes, as so construed, violated the United States Constitution. On this point, the court held, to quote the first syllabus, that

> "The tax levied on such boats and barges, pursuant to such statutory provisions, is not violative of the provisions of the Fourteenth Amendment of the Constitution of the United States."

In reaching this conclusion, the court accepted appellant's showing that appellant's boats and barges regularly operated on the waters of other states, and that only 17½ miles of the route traversed by the boats and barges, or 1.27% of the total of "barrel miles", were through waters which even bordered on Ohio. The court further conceded that under the decision of the Supreme Court of the United States in *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169, appellant's boats and barges were probably taxable on an apportioned basis by all the states down the Ohio and Mississippi Rivers through whose waters they regularly navigated. However, in spite of these facts, the court concluded that, under the case of *Northwest Air Lines, Inc.* v. *Minnesota*, 322 U. S. 292, which was mentioned but not modified in the *Ott* case, the statutes of Ohio, appellant's domicile, taxing the entire value of appellant's boats and barges, were valid. With reference to the contention of appellant that if the river states could tax the boats and barges on an apportioned basis and Ohio could at the same time tax their entire value, the boats and barges would bear a multiple tax burden, the Supreme Court of Ohio stated:

> "The Supreme Court of the United States [in the *Ott* case] applied the rule to the taxation of tangible property which it had theretofore applied to the taxation of intangible personal property, that is, that such

property may be taxed both at its domiciliary situs and at the place where it had acquired a business situs."

The record in this case makes it clear that appellant contended that, if Sections 5328 and 5325 were construed to tax appellant's boats and barges, they were repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution. The syllabus and opinion of the Ohio Supreme Court make it clear that the court first construed these statutes to tax appellant's boats and barges, and then held that, as so construed, the statutes did not violate the Constitution of the United States. However, to preclude any possible question as to these facts, the Supreme Court of Ohio has executed, and made part of the record in this case, a certificate stating:

> "The appellant in its briefs and in its oral argument before this court contended that said statutes, as so construed, were invalid on the ground that they were repugnant to the Fourteenth Amendment of the Constitution of the United States and that appellee in its brief and oral argument contended the contrary. This court further certifies that it rejected appellant's contention and sustained the validity of said statutes under the United States Constitution."

A copy of the certificate of the Supreme Court of Ohio is attached hereto as Exhibit A.

Nor is there any question that the decision of the Ohio Supreme Court as to the taxability of appellant's boats and barges is a final decision. As shown by its opinion, this case also involved issues as to the taxation of other property of appellant for the years 1943, 1944, 1945 and 1946, and some of these other issues were remanded to the Board of Tax Appeals for further action. However, the opinion clearly shows that these other issues were entirely unrelated to appellant's boats and barges, and that, as to the boats and

barges, the court's decision was final. On this point, the certificate of the Supreme Court, attached hereto as Exhibit A, states:

> "The court further certifies that its decision with respect to the taxability of appellant's boats and barges for the years 1945 and 1946 is a final judgment of this court, and that the remand of the case to the Board of Tax Appeals leaves only ministerial acts to be performed by said Board and the Tax Commissioner of Ohio in accordance with this court's decision."

E

Substantiality of Questions Involved

The question in this case is whether Ohio has jurisdiction to tax the full value of boats and barges, owned by an Ohio resident, which are regularly operated through waters of other states, which are not operated through Ohio waters, which have only about 1% of their operation through waters which even border on Ohio, and which put into an Ohio port only occasionally and incidentally, or whether the statutes under which Ohio purports to tax the full value of such boats and barges are unconstitutional as a deprivation of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

That this question is substantial will be evidenced from the following:

1. The opinion of the Supreme Court of Ohio in this case is, so far as we know, the first reported opinion of any court holding that tangible property can at the same time be taxed by one state at an apportioned value and by another state at full value. It seems to us that this conclusion is contrary to a rule long applied by the United States Supreme Court that, while intangible property may constitutionally be subjected to multiple taxation, tangible

property is constitutionally immune therefrom. The most recent case reiterating this rule is *Curry* v. *McCanless*, 307 U.S. 357 (1939).

2. The decision of the Ohio Supreme Court in the instant case, holding that property which under the *Ott* case may clearly be taxed on an apportioned basis by the river states, may also be taxed at full value by the state of domicile of the owner, is inconsistent with the statement of the Supreme Court of the United States in the *Ott* case that, under the rule of apportionment which the court for the first time applied to river boats: "There is no risk of multiple taxation."

3. The Supreme Court of the United States in the *Ott* case held specifically that there is no practical difference taxwise between river boats and rolling stock, and that the same rule of apportionment applies to each of these classes of property. This being true, the decision of the Supreme Court of Ohio in the instant case is directly contrary to the decision of the United States Supreme Court in the leading case of *Union Refrigerator Transit Company* v. *Kentucky*, 199 U.S. 194 (1905).

That case involved a Kentucky corporation which owned a fleet of cars which it rented to shippers who used them all over the United States. While there was no showing that all of the cars were outside Kentucky throughout any year, it was shown that the average number of cars used in Kentucky during the years in question ranged from 28 to 67, or from one to three percent, out of a total of 2,000 cars. In spite of this fact Kentucky, as the domicile of the owner, attempted to tax the entire value of the fleet. The Supreme Court of the United States, however, held that taxation by Kentucky of the entire fleet was violative of the due process clause of the Fourteenth Amendment, since such a large proportion of the cars was employed and lo-

cated in states other than Kentucky and were properly taxable in such other states.

4. The Supreme Court of Ohio rested its decision in the instant case on the authority of *Northwest Air Lines, Inc.* v. *Minnesota*, 322 U.S. 292 (1944), which it noted "was mentioned in the opinion in the *Ott* case but was neither modified nor limited in any way." However, the court disregarded the following fundamental distinctions between the *Northwest* case and the instant case:

(a) In the *Northwest* case, 14 to 16% of the regular route and plane mileage of the air line was within Minnesota. In the instant case, no part of the route of the boats and barges was within Ohio, only .7 of 1% of the mileage, or 1.27% of the "barrel mileage" was through waters bordering on Ohio, and the only stops ever made by the boats in an Ohio port were occasional and sporadic, and not for the purpose of loading or unloading, but only for food or minor repairs.

(b) In the *Northwest* case the maintenance bases of the air line, where the planes were overhauled and repaired, were in Minnesota. In the instant case, appellant had no terminals in Ohio and its boats were never dry-docked or overhauled in Ohio, all repairs of any consequence being made at Paducah, Kentucky, St. Louis, Missouri, or some other down-river point.

(c) In the *Northwest* case the United States Supreme Court stated that denial to Minnesota of the right to tax the full value of the airplanes "would free such floating property from taxation everywhere." The *Ott* case, *in which the facts were identical in all essentials with those of the instant case*, makes it clear that the boats and barges involved in the instant case are subject to taxation on an apportioned basis by all the river states through whose waters they regularly operate.

We submit that it is of great importance to the owners of boats and other facilities of transportation and to state taxing authorities, that this court make it clear whether boats, which under the *Ott* case are taxable on an apportioned basis by the river states, are to be free from full value taxation by the states where their owners are domiciled, or whether the Supreme Court of Ohio was right when it stated in its opinion in the instant case that:

> "The Supreme Court of the United States [in the *Ott* case] applied the rule to the taxation of tangible property which it had theretofore applied to intangible personal property, that is, that such property may be taxed both at its domiciliary situs and at the place where it had acquired a business situs."

Appellant, of course, recognizes that no actual assessment on the basis of apportionment has yet been made by any of the river states against its boats and barges. However, as indicated by the Supreme Court of Ohio, the State of Kentucky has asserted the right to tax the boats and barges on an apportioned basis, and inasmuch as its Court of Appeals has recently held that its statutes permit the levying of such a tax (*Reeves* v. *Island Creek Fuel & Transportation Company*, 230 S. W. 2d 924 (1950)) the great likelihood is that the State of Kentucky and some of the other river states will endeavor to exercise this taxing right. Apart from this, it is well established that no right to tax is conferred on a state which has no jurisdiction to tax, merely because the state which has jurisdiction has failed to exercise its right to do so.

McAfee, Grossman, Taplin, Hanning,
Newcomer & Hazlett,
Attorneys for Appellant.

Isadore Grossman,
Rufus S. Day, Jr.,
H. V. E. Mitchell,
Of Counsel.

EXHIBIT A

Certificate of the Supreme Court of Ohio

No. 32,060

IN THE SUPREME COURT OF OHIO

THE STANDARD OIL COMPANY, an Ohio Corporation, Appellant,

vs.

C. EMORY GLANDER, Tax Commissioner of Ohio, and JOHN A. ZANGERLE, Auditor of Cuyahoga County, Appellees

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Appeal From the Board of Tax Appeals

Certificate As to the Court's intent to hold Sections 5328 and 5325 General Code of Ohio to be Valid and Not Repugnant to the Fourteenth Amendment of the Constitution of the United States

The Supreme Court of Ohio hereby certifies that, when it held, in the first syllabus of its decision in the above case, that Sections 5328 and 5325 of the Ohio General Code:

> "* * * authorized the taxation, at their true value, of boats and barges owned by an Ohio corporation and operated partly on the Mississippi River and partly on the waters of the Ohio River adjacent to the State of Ohio,"

and that:

> "The tax levied on such boats and barges, pursuant to such statutory provisions, is not violative of the pro-

visions of the Fourteenth Amendment of the Constitution of the United States",

it intended thereby, as evidenced by this court's opinion in the case, to hold that the said statutes required boats and barges so owned and operated to be taxed at their true value, and that as so construed said statutes were valid and in no respect violative of or repugnant to the Fourteenth Amendment of the Constitution of the United States.

The court further certifies that the appellant in its briefs and in its oral argument before this court contended that said statutes, as so construed, were invalid on the ground that they were repugnant to the Fourteenth Amendment of the Constitution of the United States and that appellee in its brief and oral arguments contended the contrary. This court further certifies that it rejected appellant's contention and sustained the validity of said statutes under the United States Constitution.

The court further certifies that its decision with respect to the taxability of appellant's boats and barges for the years 1945 and 1946 is a final judgment of this court, and that the remand of the case to the Board of Tax Appeals leaves only ministerial acts to be performed by said Board and the Tax Commissioner of Ohio in accordance with this court's decision.

It is hereby ordered that this certificate, which is concurred in by all of the Judges of the court, be made part of the record in this case.

CARL WEYGANDT,
Chief Justice.

EXHIBIT B

Opinion of the Supreme Court of Ohio

THE STANDARD OIL CO., *Appellant*,

v.

GLANDER, TAX COMMR., ET AL., *Appellees*

Taxation—Personal property—Boats and barges of Ohio corporation—Operated on Mississippi and Ohio rivers—Sections 5325 and 5328, General Code—Machinery and equipment in process of construction—"Used" in business, when—Section 5328-1, General Code—Valuation—Obsolescence and functional depreciation to be considered—Machinery inefficient and uneconomical due to change in business conditions—Board of Tax Appeals—Decision refusing reduction in valuation unreasonable and unlawful, when—Article XIV, Amendments, U. S. Constitution.

1. The provisions of Section 5328, General Code, that "all ships, vessels and boats, * * * defined in this title as 'personal property,' belonging to persons residing in this state * * * shall be subject to taxation," and the provisions of Section 5325, General Code, defining "personal property" as including "every ship, vessel, or boat, of whatsoever name or description, used or designed to be used either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere, and whether it has been enrolled, registered, or licensed at a collector's office, or within a collection district in this state, or not," authorize the taxation, at their true value, of boats and barges owned by an Ohio corporation and operated partly on the Mississippi river and partly on the waters of the Ohio river adjacent to the state of Ohio. The tax levied on such boats and barges, pursuant to such statutory provisions, is not violative of the provisions of the Fourteenth Amendment of the Constitution of the United States.

2. The provisions of Section 5325-1, General Code, that "personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not," authorize the taxation of personal property "kept and maintained as a part of a 'plant' capable of operation." The word "plant" as used in such section is to be construed and applied as commonly understood in its ordinary acceptation and significance. Machinery and equipment designed for the production of gasoline, which are in the process of erection and construction as an addition to an operating oil refinery, constitute a part of "a plant capable of operation" and are subject to taxation by virtue of the provisions of Section 5325-1, General Code, as property "used in business."

3. Where property, due to a change in business conditions, has become obsolete, it is unreasonable and unlawful, in determining the valuation of such property for taxation purposes, not to take into consideration that machinery especially designed and constructed during a war period for the manufacture of high octane aviation gasoline, but which machinery is no longer used for such purposes by reason of the fact that the demand for such aviation gasoline has ceased, was subsequently devoted to the manufacture of other motor fuels in which such machinery is inefficient and uneconomical in operation. Such facts are competent and pertinent evidence of obsolescence and functional depreciation and are essential factors in the determination of the value of the property for tax purposes. (*B. F. Keith Columbus Co.* v. *Board of Revision of Franklin County*, 148 Ohio St., 253, approved and followed.)

4. Where a taxpayer returns its tangible personal property at a valuation in excess of the book value thereof, although filing no claim for reduction from book value under Section 5389, General Code, in connection therewith, pays the tax theretofore determined thereon, and upon audit omitted property claimed by the taxpayer to be not subject to tax is added and assessed by the Tax Commis-

sioner, from which assessment an appeal is taken under Section 5611, General Code; it is unreasonable and unlawful for the Board of Tax Appeals, upon finding that the taxpayer was entitled to a reduction in valuation in a sum which would not reduce the total value of the property assessed below the book value thereof, as shown by the taxpayer in his return, to refuse such reduction on the grounds that such tax has been paid and the time for issuance of the final amendment certificate by the Tax Commissioner has expired during such appeal. (*Wright Aeronautical Corp.* v. *Glander, Tax Commr.*, 151 Ohio St., 29, distinguished.)

(No. 32060—Decided March 14, 1951.)

APPEAL from the Board of Tax Appeals.

The appellant is The Standard Oil Company, an Ohio corporation, and the appellees are C. Emory Glander, Tax Commissioner of Ohio, and John A. Zangerle, auditor of Cuyahoga county.

This appeal from the Board of Tax Appeals involves the final orders and tax assessments made by the Tax Commissioner with respect to and on certain tangible personal property of the appellant for the tax years 1943, 1944, 1945 and 1946, respectively. Three separate appeals to the Board of Tax Appeals were prosecuted by the appellant which were consolidated in the hearing by that board. One of the appeals, involving the validity of a final assessment by the Tax Commissioner for the year 1945, was decided in favor of the appellant and no appeal was prosecuted to this court. The appeal to this court is limited to the decision of the Board of Tax Appeals in regard to Tax Commissioner's case No. 12488, which involves a final assessment certificate and an amendment thereof assessing taxes for the tax years 1943 and 1944 on a Houdry catalytic cracking unit which was in the process of construction on January 1, 1943, and on January 1, 1944, but which was not completed and not in operation on either of those tax-listing dates, and Tax Commissioner's case No. 14381, which is an appeal from final orders of the Tax Commissioner

assessing taxes for the tax years 1945 and 1946, respectively, on certain towboats and barges of the appellant, the then finished and operating Houdry catalytic cracking unit above referred to and certain machinery and equipment in process of construction which were unfinished and not in operation on January 1, 1945, and January 1, 1946.

The decision of the Board of Tax Appeals affirmed in most respects the orders and assessments in each of these causes, and the appellant, by appeal to this court, presents the question whether the decision of the Board of Tax Appeals is unreasonable or unlawful.

Messrs. McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett and Mr. Rufus S. Day, Jr., for appellant.

Mr. Herbert S. Duffy, attorney general, and Mr. Donald B. Leach, for appellee Tax Commissioner.

MATTHIAS, J.

The appellant has assigned numerous errors with respect to each of the two appeals considered by the Board of Tax Appeals and which the board determined adversely to appellant. These assignments have been summarized in the brief of the appellant and will be discussed in the order therein stated.

The first questions of law presented are: Did the state of Ohio have jurisdiction, under Section 5325, General Code, to assess taxes for the years 1945 and 1946 upon certain boats and barges of the company which were not in use in Ohio and the use of which in waters bordering on Ohio was insubstantial, and is such assessment violative of the Fourteenth Amendment of the Constitution of the United States?

The record discloses that in its 1945 personal property tax return the appellant listed three towboats and 31 barges at a depreciated book value of $1,017,518, and in 1946 listed boats and barges having a depreciated book value of $726,733. The Tax Commissioner on audit raised the valuation of the boats and barges for 1945 to a true value of $1,322,863 and raised the valuation for 1946 to a true value of $1,303,907. Thereafter, within time, the ap-

pellant filed its application for review and redetermination for 1945 and 1946, contending, first, that its crude oil boats and barges, which carried crude oil from various points on the Mississippi river, up the Mississippi and Ohio rivers, to points in Indiana and Kentucky, were not taxable in Ohio under Section 5325, General Code, for the reason that they were not used in Ohio and their use in waters bordering on Ohio was insubstantial and, therefore, taxation of these boats and barges by the state was violative of the due process clause of the Fourteenth Amendment of the United States Constitution.

The crude oil boats and barges involved constituted the greater part of the valuation upon which the taxes assessed were based. The remainder of the assessed value represented gasoline boats and barges engaged in transporting gasoline to various points in Ohio. These latter boats and barges are not involved in the controversy.

The contentions of the appellant were rejected in their entirety by the Tax Commissioner on review and redetermination. Upon appeal the Board of Tax Appeals held that, under Section 5325, General Code, with the exception of one small boat valued at $3,500, the oil boats and barges of the appellant were taxable in Ohio. The board announced that, being an administrative tribunal, it had no jurisdiction to decide the constitutional question presented.

The facts upon which the appellant bases its claim of want of jurisdiction of the state to levy such tax are as follows:

These crude oil boats and barges, during 1944 and 1945, were engaged in transporting oil from various points on the lower Mississippi river to Mount Vernon, Indiana, and Bromley, Kentucky. The crude oil unloaded at Mount Vernon, Indiana, was moved from that point by pipe line to various destinations, and the oil unloaded at Bromley, Kentucky, was likewise moved to the appellant's refinery at Latonia, Kentucky.

The appellant introduced evidence to show the number of miles traversed and the number of barrels of oil carried by each boat on each routing during the years 1944 and 1945. This evidence showed that the greater bulk of the opera-

tion of these boats during each year was over three routes —Memphis, Tennessee, to Mount Vernon, Indiana, Memphis, Tennessee, to Bromley, Kentucky, and Baton Rouge or Gibson, Louisiana, to Bromley, Kentucky; and that of the total river-route mileage traversed by the appellant's crude oil boats and barges from the lower Mississippi river to Bromley, Kentucky, only 17½ miles was through waters bordering on the state of Ohio.

In an attempt to arrive at a percentage figure the appellant computed these activities on a basis of "barrel miles" (number of miles multiplied by number of barrels carried) and found that the percentage of barrel miles on the portion of the river bordering on Ohio was, in 1944 and 1945, 1.27 per cent of the total barrel miles. If is claimed that none of the barrel miles was actually within the state of Ohio since its border is the low water mark on the Ohio side of the river and the boats and barges were operated south of the border.

These crude oil boats and barges were registered from Cincinnati but, except for short stops for food, fuel or minor repairs, never were docked at Cincinnati, all repairs being made at Paducah, Kentucky, St. Louis, Missouri, or some other down-river point. No cargoes were ever taken on at Cincinnati during the years 1944 and 1945.

The appellant contends that, even if the company's crude oil boats and barges were constitutionally within Ohio's jurisdiction, Section 5325, General Code, should not be so construed as to authorize taxation thereof.

Section 5328, General Code, provides in part as follows:

"All ships, vessels and boats, and shares and interests therein, defined in this title as 'personal property,' belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, shall be subject to taxation."

Section 5325, General Code, defines "personal property" as follows:

"* * * every ship, vessel, or boat, of whatsoever name or description, used or designed to be used either exclusively

or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere and whether it has been enrolled, registered, or licensed at a collector's office, or within a collection district within this state, or not."

The appellant contends that its boats would be taxable in Ohio only if they were "used or designed to be used exclusively or partially in navigating any waters within or bordering on this state"; that, since the boats and barges were being used exactly as "designed," the only question under the statute is whether the actual use made of the boats and barges during the years in question brought them within the provisions of the statute.

The company contends that although this statute purports to tax boats operating in waters bordering on Ohio, it should not be construed to apply to boats whose use in waters within or bordering on Ohio was insubstantial. This contention is based upon the maxim, *de minimis non curat lex*. The decision of the Supreme Court of the United States in the case of *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S., 680, 90 L. Ed., 1515, 66 S. Ct., 1187, is cited in support of that contention. That case involved portal to portal pay.

Both the Tax Commissioner and the Board of Tax Appeals refused to adopt that interpretation of Section 5325, General Code. We quote from the decision of the Board of Tax Appeals:

"Section 5366, General Code, characterizes as 'taxable property' all the kinds of property mentioned or referred to in the above quoted provisions of Section 5328, General Code. Section 5371, General Code, provides generally that personal property used in business shall be listed and assessed in the taxing district in which such business is carried on. This section, however, further provides as follows:

"'Ships, vessels, boats and aircraft, and shares and interests therein, shall be listed and assessed in the taxing

district in which the owner resides.' Inasmuch as it appears that at all of the times here in question these boats and barges were used in part in navigating the waters of the Ohio river bordering on this state, such boats and barges as the property of the appellant, an Ohio corporation having its domicile in this state, were clearly taxable under the expressed terms of the above noted statutory provisions."

We are in accord with that statement for it clearly appears that under the facts disclosed by the record such crude oil boats and barges were not used exclusively in another state and, therefore, came within the provisions of Section 5328, General Code.

Since these crude oil boats and barges came within the provisions of Sections 5325 and 5328, General Code, the contention of the appellant that the boats and barges were not within the jurisdiction of the state of Ohio for tax purposes becomes pertinent. The appellant contends that tangible personal property is not constitutionally subject to multiple taxation and, therefore, is taxable only by the state in which it has its situs. Further, appellant contends that under the decision of the Supreme Court of the United States in the recent case of *Ott, Commr.*, v. *Mississippi Valley Barge Line Co.*, 336 U. S., 169, 93 L. Ed., 585, 69 S. Ct., 432, river boats are subject to taxation only in accordance with the rule of proportionate taxation heretofore applied in the taxation of the rolling stock of railroads. This contention requires an examination of that case for if it is applicable to the boats and barges owned by the appellant, there is now no provision in the laws of Ohio under which they may be taxed.

The facts in the *Ott case, supra,* are set forth in the opinion, as follows:

"Appellees are foreign corporations which transport freight in interstate commerce up and down the Mississippi and Ohio rivers under certificates of public convenience and necessity issued by the Interstate Commerce Commission. Each has an office or agent in Louisiana but its principal place of business is elsewhere. The barges and towboats,

which they use in this commerce are enrolled at ports outside Louisiana; but they are not taxed by the states of incorporation.

"In the trips to Louisiana a tugboat brings a line of barges to New Orleans where the barges are left for unloading and reloading. Then the tugboat picks up loaded barges for return trips to ports outside that state. There is no fixed schedule for movement of the barges. But the turnarounds are accomplished as quickly as possible with the result that the vessels are within Louisiana for such comparatively short periods of time as are required to discharge and take on cargo and to make necessary and temporary repairs.

"Louisiana and the city of New Orleans levied ad valorem taxes under assessments based on the ratio between the total number of miles of appellees' lines in Louisiana and the total number of miles of the entire line. The taxes were paid under protest and various suits, which have been consolidated, were instituted in the District Court by reason of diversity of citizenship for their return, the contention being that the taxes violated the due process clause of the Fourteenth Amendment and the commerce clause."

Following the citation and analysis of the cases wherein the court had evolved the rule that vessels are taxable solely at the domicile of the owners, save where they had acquired an actual situs elsewhere, the Supreme Court of the United States concluded as follows:

"We see no practical difference so far as either the due process clause or the commerce clause is concerned whether it is vessels or railroad cars that are moving in interstate commerce. The problem under the commerce clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' *Nashville, C & St. L. Ry.* v. *Browning*, 310 U. S., 362, 365 [, 84 L. Ed., 1254, 1255, 60 S. Ct., 968]. So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded

by the taxing state. See *Wisconsin* v. *J. C. Penny Co.*, 311 U. S., 435, 444 [, 85 L. Ed., 267, 270, 61 S. Ct., 246, 130 A. L. R., 1229]. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the state.

"There is such an apportionment under the formula of the *Pullman case*. Moreover, that tax, like taxes on property, taxes on activities confined solely to the taxing state, or taxes on gross receipts apportioned to the business carried on there, has no cumulative effect caused by the interstate character of the business. Hence there is no risk of multiple taxation. Finally, there is no claim in this case that Louisiana's tax discriminates against interstate commerce. It seems therefore to square with our decisions holding that interstate commerce can be made to pay its way by bearing a nondiscriminatory share of the tax burden which each state may impose on the activities or property within its borders. See *Western Live Stock* v. *Bureau of Revenue*, 303 U. S., 250, 254, 255 [, 82 L. Ed., 823, 826, 827, 58 S. Ct., 546, 115 A. L. R., 944], and cases cited. We can see no reason which should put water transportation on a different constitutional footing than other interstate enterprises."

As hereinbefore stated, the question before the Supreme Court of the United States in the *Ott case* was whether the state of Louisiana and the city of New Orleans could levy ad valorem taxes based upon a mileage percentage figure. The appellant in the instant case contends that that decision has the effect of substituting a new formula for the long established rule of taxation whereby states, wherein the owners of watercraft are domiciled, can tax such boats to their full value as other personal property so owned is taxed. It is to be noted however, that this conclusion must be reached by inference from the language used in the *Ott case*. It is not within the scope of the facts there presented or the decision rendered thereon.

Other recent decisions of the Supreme Court of the United States are more directly in point; cases in which that court recognized the right of the domiciliary state to

levy the full ad valorem tax on personal property passing through other states in interstate commerce.

In the case of *Northwest Airlines, Inc.*, v. *Minnesota*, 322 U. S., 292, 88 L. Ed., 1283, 64 S. Ct., 950, the question presented was stated by Mr. Justice Frankfurter, as follows:

"The question before us is whether the commerce clause or the due process clause of the Fourteenth Amendment bars the state of Minnesota from enforcing the personal property tax it has laid on the entire fleet of airplanes owned by the petitioner and operated by it in interstate transportation. The answer involves the application of settled legal principles to the precise circumstances of this case. To these, about which there is no dispute, we turn."

The pertinent facts therein were as follows:

"Northwest Airlines is a Minnesota corporation and its principal place of business is St. Paul. It is a commercial airline carrying persons, property and mail on regular fixed routes, with due allowance for weather, predominantly within the territory comprising Illinois, Minnesota, North Dakota, Montana, Oregon, Wisconsin and Washington. For all the planes St. Paul is the home port registered with the Civil Aeronautics Authority, under whose certificate of convenience and necessity Northwest operates. At six of its scheduled cities, Northwest operates maintanance bases, but the work of rebuilding and overhauling the planes is done in St. Paul. Details as to stopovers, other runs, the location of flying crew bases and of the usual facilities for aircraft, have no bearing on our problem.

"The tax in controversy is for the year 1939. All of Northwest's planes were in Minnesota from time to time during that year. All were, however, continuously engaged in flying from state to state, except when laid up for repairs and overhauling for unidentified periods. On May 1, 1939, the time fixed by Minnesota for assessing personal property subject to its tax (Minn. Stat. 1941, Section 273.01), Northwest's scheduled route mileage in Minnesota was 14% of its total scheduled route mileage, and the scheduled plane mileage was 16% of that scheduled. It based its personal

property tax return for 1939 on the number of planes in Minnesota on May 1, 1939. Thereupon the appropriate taxing authority of Minnesota assessed a tax against Northwest on the basis of the entire fleet coming into Minnesota. For that additional assessment this suit was brought. The Supreme Court of Minnesota, with three judges dissenting, affirmed the judgment of a lower court in favor of the state, [*State* v. *Northwest Airlines, Inc.*,] 213 Minn., 395, 7 N. W. (2d), 691. A new phase of an old problem led us to bring the case here. [*Northwest Airlines, Inc.*, v. *Minnesota*,] 319 U. S., 734 [87 L. Ed., 1695, 63 S. Ct., 1031]."

In holding that the state of Minnesota was authorized to levy a tax upon "all personal property of persons residing therein, including the properties of corporations," the court reviewed its decisions in previous cases and held that the doctrine of tax apportionment for instrumentalities engaged in interstate commerce introduced in *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S., 18, 35 L. Ed., 613, 11 S. Ct., 876, was inapplicable. Relying on the case of *People, ex rel. New York Central & Hudson River Rd. Co.*, v. *Miller*, 202 U. S., 584, 50 L. Ed., 1155, 26 S. Ct., 714, the court stated:

"Here, as in that case, a corporation is taxed for all its property within the state during the tax year none of which was 'continuously without the state during the whole tax year.' * * * The fact that Northwest paid personal property taxes for the year 1939 upon 'some proportion of its full value' as its airplane fleet in some other state does not abridge the power of taxation of Minnesota as the home state of the fleet in the circumstances of the present case."

It is to be noted that the *Northwest Airlines case* was mentioned in the opinion in the *Ott case*, but it was neither modified nor limited in any way. In its essential facts the *Northwest Airlines case* is similar to the instant case. It involved a tax by the domiciliary state whereas the *Ott case* involved the validity of a tax by a state other than the domiciliary state. We do not believe the *Northwest Airlines case* and the *Ott case* are in conflict. The Supreme Court of the United States applied the rule to the taxation of

tangible personal property which it had theretofore applied to the taxation of intangible personal property, that is, that such property may be taxed both at its domiciliary situs and at the place where it had acquired a business situs.

It is pertinent to note that in the instant case we are not considering the taxation of the property of a public utility engaged in interstate transportation but rather the taxability of property of a domestic corporation which operated both within and beyond the limits of this state. Further, since the company here is not a public utility, there is no provision under the statutes of this state for the establishment of any mileage, barrel mileage, time period or other arbitrary classification, and this court is entirely without authority to select any apportionment method and adopt it as the correct applicable principle. That is purely a legislative function and, as hereinbefore stated, if the tax levied is unconstitutional it follows that there is no liability therefor whatever. The record does not disclose that any other state taxed these boats and barges, although there is an inference that Kentucky is now asserting its right to do so. We conclude that the levying of the tax in question was not violative of the Fourteenth Amendment of the Constitution.

We come now to the question of machinery and equipment in process of construction.

The company included no machinery in process of construction in its personal property tax returns for the years 1943, 1944, 1945 and 1946, claiming such property was not taxable. The Tax Commissioner, on audit for those years, found such machinery to be taxable and added to the assessment certificate for 1943 and 1944 the value, at book cost, of the unfinished Houdry catalytic cracking plant, assessed the machinery in each of those years at 50 per cent of cost and allowed a further reduction in book cost of 12 per cent, because he found that book cost exceeded the "true value" by such percentage.

The unfinished Houdry plant was the only machinery in process of construction involved in the 1943 and 1944 assessment, and the plant was completed by January 1, 1945. However, in the tax years 1945 and 1946, the company

had other machinery, the bulk of which constituted an unfinished thermal gas plant located at Cleveland. The Tax Commissioner added these to the tax assessment certificate for the years 1945 and 1946, valuing them at 50 per cent of the book value.

The company contends that such machinery was not taxable in any of those years and that the Houdry plant should have been given a reduced valuation by reason of the excessive cost of construction on account of war emergency conditions existing at the time of the erection of that plant and of obsolescence.

The Tax Commisioner held that the machinery in process of construction was "used in business" within the definition of that term in Section 5325-1, General Code. The pertinent part of that section reads as follows:

"Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise * * *"

The Board of Tax Appeals held that the clause, "when kept and maintained as a part of a plant capable of operation, whether actually in operation or not," covers machinery in process of construction.

The company and the Tax Commissioner are in disagreement as to the meaning of the words, "kept," "maintained" and "part of a plant capable of operation," disclosing that the limited language used in the section in defining "used in business" requires our consideration.

It is the contention of the company that the words, "kept and maintained," as applied to the machinery herein, contemplate machinery completed and operative, since machinery is not maintained until it first has been completely constructed. The Tax Commissioner ascribes to the words a broader meaning which includes retaining possession of

the machinery, and asserts that its retention and prevention of corrosion and other deterioration constitute "maintaining" within the definition of the term.

Much more divergence of view occurs when the parties hereto define the word, "plant." The company defines the word, "plant," as including only the Houdry catalytic cracking plant and the Thermal cracking plant and claims that, since each of these, of itself, was machinery in process of construction for the tax years in question, it necessarily could not be "part of a plant capable of operation," for it was not completed.

In the view of the Tax Commissioner the "plant" consisted of the entire operating refinery and included its many operating units among which were the Houdry catalytic cracking plant and the Thermal cracking plant, and consequently these units, even while under construction, were parts of a "plant capable of operation."

The Board of Tax Appeals, in construing Section 5625-1, General Code, *supra*, made the following observation:

"It is to be observed however that the above noted provisions of Section 5325-1, General Code, were not enacted with special reference to either appellant's refineries at Cleveland or elsewhere or to petroleum refineries generally in this state. And in this view recognition must be given to the general definition that in an industrial or commercial sense, a 'plant' includes real estate and all else that represents capital invested in the means of carrying on a business, exclusive of raw material or the manufactured product. This leads to the conclusion that as to the refinery property of the appellant each refinery as a whole at its location in Cleveland or elsewhere is 'a plant' within the meaning of Section 5625-1, General Code. Inasmuch as each unfinished item or [*sic*] machinery and equipment here in question was a part of a refinery or 'plant' capable of operation and in actual operation and was kept and maintained as such, it was property 'used' and 'used in business' within the meaning of the taxing statutes here under consideration."

In our view such application of Section 5625-1, General Code, is in accord with the well established rule that words

of a statute, in common use or other than terms of art or science, will be construed in their ordinary acceptation and significance and with the meaning commonly attributed to them. *Mutual Bldg. & Investment Co.* v. *Efros*, 152 Ohio St., 369, 89 N. E. (2d), 648.

The following statement from 37 Ohio Jurisprudence, 546, Section 290, is pertinent:

"Courts should be slow to impart any other than their natural and commonly understood meaning to terms employed in the framing of a statute. Too narrow a construction of terms is not favored. Statutory phraseology should not be given an unnatural, unusual, strained, arbitrary, forced, artificial, or remote meaning which may, in its last analysis, be technically correct but wholly at variance with the common understanding of men. A technical construction of words in common use is to be avoided."

We hold that the decision of the Board of Tax Appeals that the Houdry catalytic cracking plant and the Thermal cracking plant, although under construction, constituted machinery "kept and maintained as a part of a plant capable of operation" was not unreasonable or unlawful.

Having determined that the Houdry plant, with other machinery, was subject to taxation while in the process of construction, the question directly presented is whether the valuation thereof by the commissioner, as corrected and modified by the Board of Tax Appeals, constituted the true value thereof.

The principal contention of the company as to assessed value relates to the Houdry catalytic cracking plant. That plant was a war project and was constructed to produce aviation gasoline much needed during the war, and because of the urgent need for and shortage of such fuel the company necessarily expended large sums of money in overtime wages and for required materials, with a result that the plant cost $2,419,102.76 more to construct than the estimate furnished by the construction company. Both the company and the Tax Commissioner agree that the part of such "overrun," or excessive cost of construction,

which did not add value to the property, should be eliminated from the assessed value thereof. The difference between the parties in that regard is primarily one of fact—the company urging that the amount of "overrun" should be $1,423,852, whereas the Tax Commissioner held it to be $977,777.

On appeal, the Board of Tax Appeals fixed the amount of such excess costs at $1,200,000. The company contends that, on a percentage basis, the book value should be reduced by 15.64 per cent. The Board of Tax Appeals made this percentage 13.18 per cent of cost. These figures, of course, involve the value of the plant as completed but are likewise applicable to the plant when under construction in 1943 and 1944. These percentages were used by the Board of Tax Appeals, together with a depreciation allowance for the years it was used after completion, resulting in a valuation for tax year 1943 at $377,580, 1944, $5,399,459, 1945, $6,593,502 and 1946, $5,899,439.

The company contends that the figure arrived at by the Board of Tax Appeals not only failed to give sufficient allowance for the excess cost of construction or "overruns" but also made inadequate allowance for obsolescence of the Houdry catalytic cracking plant which it contends became partially obsolete at the termination of the war because the process of catalytic cracking had been replaced by more efficient methods.

The Houdry plant consisted of several units, which were a six-case unit, a three-case unit and foundations for another three-case unit which has never been constructed. The record discloses that the three-case unit was originally built as a special attachment to the six-case basic Houdry unit to assist the six-case unit in producing as large a quantity of high octane gasoline as possible during the war. Its function was to treat oil, which had been partly processed in the six-case unit, in such manner as to step up its octane rating for aviation purposes. That use terminated with the war, and the only use of the three-case unit during the year 1946 was in the manufacture of motor gasoline.

The record discloses that the three-case unit was inefficient in operation, not yielding as large a percentage of

motor fuel from the oil processed as the larger regularly designed unit, resulting in a higher cost of operation.

The company claims that in the year 1946 it was entitled to a deduction from the value of this Houdry plant in the sum of $1,292,077 for obsolescence of the three-case unit and for the foundation of the three additional cases which were never built. The Board of Tax Appeals did regard the base for the additional cases as to some extent idle equipment and consequently reduced the value thereof from $135,000 to $13,500, but refused to allow any reduction by reason of the claimed obsolescence of the three-case unit. The board considered it as a part of the Houdry catalytic cracking plant as a whole and as an operating unit thereof and applied to it the same rate of reduction for depreciation and overrun as were determined applicable to the remainder of the plant.

Evidence in the record supports the determination of the Board of Tax Appeals that the "overruns" totaled $1,200,000, and its decision in that respect was not unreasonable or unlawful. However, the refusal of the Board of Tax Appeals to make some allowance for obsolescence of the three-case unit was unreasonable and unlawful in that the Board of Tax Appeals failed to apply the principles established by this court in the case of *B. F. Keith Columbus Co.* v. *Board of Revision of Franklin County,* 148 Ohio St., 253, 74 N. E. (2d), 359. The syllabus of that case provides as follows:

"1. In determining the value of property for the purpose of taxation, the assessing body must take into consideration all factors which affect the value of the property.

"2. Functional depreciation occurs where property, although still in good physical condition, has become obsolete or useless due to changing business conditions and thus for all practical considerations is of little or no value to the owner of such property.

"3. Where the evidence shows that, due to a change of business conditions, property has become obsolete, it is unreasonable for the assessing body not to consider this factor of functional depreciation in arriving at the tax value."

The facts in regard to the limited use of this three-case unit were not in dispute and require some allowance for the disclosed obsolescence. The failure of the Board of Tax Appeals to make such determination renders their decision as to the value of the Houdry plant for the year 1946 unreasonable and unlawful and requires a reversal of the order in that regard and a remand to the board for the redetermination of the correct true value of such plant for the year 1946.

At the conclusion of the proceeding before the Board of Tax Appeals, an application for rehearing was filed by the company wherein it protested the failure of the board to reduce the value of the machinery and equipment in the full amount of the excess valuation theretofore determined by it.

For the year 1945 the company failed to file a claim for deduction from book value (form 902) for the taxable property of the company, as disclosed by its inter-county return, so that, when the machinery in process of construction (the thermal plant) was added to the return, the sum of all the property listed exceeded the book values originally returned in the inter-county tax return by the sum of $561,027.

When the Tax Commissioner determined that the excess cost of construction or "overrun" on the Houdry plant was $988,000, he allowed only the sum which the true valuations as determined exceeded the listed book values, or a reduction in the sum of $561,027. The company contends that since all such property was in Cuyahoga county wherein the true value of the property found exceeded the book value by the sum of $900,002, the latter sum should have been allowed.

However, the company having concededly paid taxes on a basis in excess of the book values of personal property in Cuyahoga county as stated in its inter-county tax return, the Board of Tax Appeals held that as to the year 1945 any question of reducing the assessed tax values below those on which the company had paid the tax was moot and should not be considered, and allowed no reduction.

The company contends that the payment of the tax on the higher basis shown by the return did not render the question

involved moot, but on the contrary the reduction should have been allowed because the classified tax law permits the refund to a taxpayer of a tax he has already paid but which, on appeal, is held not to have been owed. That contention is based on the provisions of Section 5395, General Code, which provides in part as follows:

"Excepting as to any taxable property concerning the assessment of which an *appeal has been filed* under Section 5611 of the General Code, the Tax Commissioner may finally assess the taxable property required to be returned by any taxpayer * * * for any prior year or years within the time limited therefor in Section 5377 of the General Code * * *." (Emphasis supplied.)

The Board of Tax Appeals in its decision admits, in effect, that the taxpayer was entitled to a reduction in valuation in the sum of $900,002, but states, in effect, that, because the appeal was determined after the time for issuance of the final assessment certificate by the Tax Commissioner had expired and the tax had been paid, such reduction would be ineffective. The payment of the tax when due to avoid interest and penalties and when accompanied by a proper appeal protects all the taxpayer's rights until all administrative and judicial review thereof is completed.

Where a taxpayer is required by law to file an inter-county return he is not thereby precluded from claiming the rights of a taxpayer filing a return in a single county. (*Wright Aeronautical Corp.* v. *Glander, Tax Commr.*, 151 Ohio St., 29, 84 N. E. [2d], 483, distinguished.)

The decision of the Board of Tax Appeals is not unreasonable or unlawful except as to its refusal to make proper allowance for obsolescence in the year 1946 and its refusal to grant the taxpayer proper reduction to book values for the year 1945 as above indicated.

The cause is accordingly remanded to the Board of Tax Appeals for further proceeding in accordance with this opinion.

Decision affirmed in part and reversed in part.

WEYGANDT, C. J., ZIMMERMAN and HART, JJ., concur.

STEWART and TAFT, JJ., concur, except in paragraph two of the syllabus and the portion of the opinion relating thereto.

MIDDLETON, J., not participating.

TAFT, J., concurring. I have considerable doubt about paragraph two of the syllabus. However, I reach the same result on another ground. The Houdry plant, even before it was "capable of operation," was at that time "acquired or held as means or instruments for carrying on the business" within the meaning of the words found in Section 5325, General Code. At that time, the Houdry plant might not be so "held" but it was so "acquired." The words "acquired or held" are in the disjunctive.

STEWART, J., concurs in the foregoing concurring opinion.

EXHIBIT C

Opinion and Entry of the Board of Tax Appeals of Ohio

BEFORE THE BOARD OF TAX APPEALS, DEPARTMENT OF TAXATION OF OHIO

Consolidated cases Nos. 12488, 14381 and 14514

THE STANDARD OIL COMPANY, Cleveland Ohio, Appellant,

v.

C. EMORY GLANDER, Tax Commissioner of Ohio, Appellee.

Nov. 19, 1949

ENTRY

These several causes and matters came on to be heard and considered by the Board of Tax Appeals on appeals heretofore filed by the appellant above named, and Ohio cor-

poration, from final orders and tax assessments made by the tax commissioner on and with respect to certain tangible personal property of the appellant for the tax years 1943, 1944, 1945 and 1946, respectively. Case No. 12488 is an appeals filed herein from a final assessment certificate and amendment thereof assessing for the tax years 1943 and 1944, respectively, a Houdry catalytic cracking unit which was in process of construction on January 1, 1943, and on January 1, 1944, but which was unfinished and not yet in operation on each of said tax listing dates. Case No. 14381 is before the Board on two appeals, as amended, from final orders of the tax commissioner here in question for the tax years 1945 and 1946, respectively, on certain towboats and barges of the appellant company, on the then finished and operating Houdry catalytic cracking unit, above referred to, and on certain machinery and equipment in process of construction which was unfinished and not in operation on January 1, the tax listing day in each of said tax years. Case No. 14514 is an appeal from a final assessment certificate of the tax commissioner for the tax year 1945, which tax certificate was made and issued after the appeal for said tax year in case No. 14381 was filed herein; and aside from the question of the authority of the tax commissioner to make such final assessment, the issues presented in this appeal are the same as those noted in the appeal in case No. 14381, so far as the tax assessments in question for the year 1945 are concerned. These cases were heard and submitted to the Board on said several and respective appeals, on transcripts of the proceedings of the tax commissioner relating to the several tax assessments complained of, on evidence offered and introduced by the parties on a consolidated hearing of the cases before an examiner of the Board and on the briefs of counsel.

The first question presented to the Board on the hearing and submission of these cases is that presented in the appeals as amended for the tax years 1945 and 1946 in case No. 14381, with respect to the taxability of certain towboats and barges which were owned by the company on tax listing day in said tax years, and which were used by it in the transportation of petroleum and petroleum products on the

Mississippi and Ohio Rivers during the years 1944 and 1945. As to this it appears that the company listed these towboats and barges in the personal property tax returns which it made as an inter-county corporation for the tax years 1945 and 1946, respectively, and that the tax commissioner assessed these boats and barges on the basis of a true value of the same in the amount of $1,322,863 for the tax year 1945 and on the basis of the true value of $1,303,907 for the tax year 1946—the assessment in each case being on a list or assessed valuation of 70% of the determined true valuation. Of the boats and barges returned for taxation by the company in said tax years certain boats and barges having a true valuation of $109,541 for the tax year 1945, and $102,022 for the tax year 1946, were used by the company in transporting gasoline from the company's refinery at Latonia, Kentucky, to various Ohio River points in this state. No question is made in this case by the appellant with respect to the boats and barges so used. The other boats and barges of the company, the taxability of which is a question at issue in this case, were used by the company for the transportation of crude oil from Gibson Landing in the state of Louisiana and from other points on the Mississippi River, up that river and up the Ohio River to Mt. Vernon, Indiana, where the company had a pipe line terminal, and to Bromley, Kentucky, from which point crude oil was delivered for use at the company's refinery at Latonia, Kentucky.

These boats and barges in transporting crude oil to the company's pipe line terminal at Mt. Vernon, Indiana, did not, of course, reach that part of the waters of the Ohio River which border on the State of Ohio; while these same boats and barges in transporting crude oil to Bromley, Kentucky, a point across the river from Cincinnati, Ohio, traverse the waters bordering on this state for a distance of only 17½ miles—the distance from the Ohio-Indiana line to Bromley. And, apparently, no part of the movement of these boats and barges is in waters within the territory of the State of Ohio—which territory extends only to low water mark on the Ohio side of the river—, unless it be on relatively infrequent occasions when empty boats nose

into the dock at Cincinnati for minor repairs or for the purpose of taking on food supplies.

In this situation the appellant contends that these boats and barges were not taxable under the provisions of section 5328 and other related sections of the General Code, for the tax years here in question, for the stated reasons (1) that the navigation of the waters of the Ohio River bordering on this state were so inconsequential that these boats and barges did not have the character of "personal property within the purview of section 5325, General Code," and (2) that consistently with the requirement of due process in the taxation of property of this kind the state was not authorized to make the tax assessments here in question. In this connection it may be observed that inasmuch as it appears that the taxes assessed on these boats and barges for the tax years 1945 and 1946 have been paid (Rec. p. 16), it may well be doubted whether anything more than a moot question is here presented with respect to the taxability of this property for said tax years. See The Central Iron and Metal Co. v. Evatt, 27 O. O., 1.

Passing this point, however, and addressing ourselves to the merits of the question presented on this assignment of error, it is noted that section 5328, General Code, provides, among other things, that:

> "All ships, vessels, and boats, and shares and interests therein, defined in this title as 'personal property,' belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, shall be subject to taxation."

Section 5325, General Code, defining the term "personal property" for purposes of taxation includes in this term "every share or portion, right, or interest, either legal or equitable, in and to every ship, vessel, or boat, of whatsoever name or description used or designed to be used either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere, and whether it has been enrolled, registered, or licensed

at a collector's office, or within a collection district in this state, or not."

Section 5366, General Code, characterizes as "taxable property" all the kinds of property mentioned or referred to in the above quoted provisions of section 5328, General Code. Section 5371, General Code, provides generally that personal property used in business shall be listed and assessed in the taxing district in which such business is carried on. This section, however, further provides as follows:

> "Ships, vessels, boats and aircraft, and shares and interests therein shall be listed and assessed in the taxing district in which the owner resides."

Inasmuch as it appears that at all of the times here in question these boats and barges were used in part in navigating the waters of the Ohio River bordering on this state, such boats and barges as the property of the appellant, an Ohio corporation having its domicile in this state, were clearly taxable under the expressed terms of the above noted statutory provisions. In this connection it is pertinent to note, further, that by section 5388, General Code, it is provided, with certain exceptions not here important, that personal property shall be listed and assessed at seventy per centum of the true value thereof, in money, on the day as of which it is required to be listed.

As to the constitutional question presented by appellant in its assignment of error with respect to the taxation of these boats and barges for said tax years, it may be observed that the above noted statutory provisions relating to the taxation in this state of property of this kind, were enacted in apparent recognition of the then established rule that consistently with the requirement of due process of law in the taxation of property of this kind, ships, vessels and boats which are designed for and are used in navigating the high seas, the Great Lakes or the inland waters of this country were taxable only at the domicile of the owner or owners of such property, unless such ships, vessels or boats have acquired an actual situs in another

state by being engaged in navigation wholly within the limits of such other state. *Pioneer Steamship Company* v. *Evatt*, 18 O. O., 510, 514, and cases therein cited; *Ott* v. *Mississippi Valley Barge Line Company* (U. S. Supreme Court case No. 244), decided February 7, 1949; 93 L. Ed.—Advance Opinions—431, 434. This rule that in a situation such as that here presented, property of this kind can be taxed only at the domicile of the owner, has been limited by the decision of the United States Supreme Court in the case of *Ott* v. *Mississippi Valley Barge Line Company, supra,* wherein it was held that a state other than that which is the domicile of the owner of boats and barges navigating the waters of the Mississippi and Ohio Rivers, may levy a tax extended on the proportionate value of such boats and barges represented by the total number of miles of the lines of navigation by such boats and barges in the taxing state as compared to the total number of miles of the entire line of navigation in said rivers. As to this it may be observed, however, that it does not appear in the facts of the above cited case that the boats and barges there in question had been taxed in the state where the owner thereof was incorporated and had its domicile. Moreover, neither in the *Ott case* nor in any other case which has come to our attention has it been expressly held that the domiciliary state has not the power and authority to levy a tax on property of this kind extended on the value of such property or upon some stated statutory percentage thereof. If it be thought that the decision of the Supreme Court of the United States in the *Ott case* in some of its implications has the effect of limiting the above noted statutory provisions of this state providing for the taxation of the boats and barges here in question so as to render unconstitutional the taxes here in question on this assignment of error, it may be observed that the Board of Tax Appeals as an administrative and quasi judicial tribunal will not assume jurisdiction and authority to consider and determine such constitutional question. *National Distillers Products Corp.* v. *Glander*, 49 Abs., 330, 337. See *Hillsborough Township* v. *Cromwell*, 326 U. S., 620, 625, 90 L. Ed., 358, 364; *Schwartz* v. *Essex County Board of Taxa-*

tion, 120 N. J. L., 129, 132, affirmed 130 N. J. L., 177. In the case last above cited it was said:

> "It is undisputable that the determination of the constitutionality of an act of the legislature rests with a judicial body; not with a quasi judicial body such as the State Board of Tax Appeals. The final responsibility to pass upon the constitutionality of a given piece of legislation rests in the courts and it is the duty of the various state agencies and administrative bodies to accept a legislative act as constitutional until such time as it has been declared to be unconstitutional by a qualified judicial body."

In this situation and in view of the fact that no question is here made as to either the true or list values of the boats and barges of the appellant for said tax years, the tax assessments here in question are affirmed except as to the assessments on the M. V. Mt. Vernon, a small towboat having a value of about $3500, and which during the years 1944 and 1945 did not navigate any of the waters of the Ohio River bordering on this state; as to the assessments on this boat the order of the tax commissioner is reversed.

A further question submitted to the Board on the presentation of this case is that as to the taxability of certain machinery and equipment of various kinds which were in process of construction on January 1 in the tax years 1943, 1944, 1945 and 1946, respectively, but which as to the particular machinery and equipment here in question were unfinished and not in operation on said several tax assessment dates. This question with respect to the tax years 1943 and 1944 is presented on an assignment of error in the appeal filed herein as case No. 12488, and relates to an unfinished Houdry catalytic cracking unit at the company's refinery at Cleveland, the construction of which commenced in August 1942 but the construction of which was not completed until about July 1, 1944. By January 1, 1945, the Houdry catalytic cracking plant had been completed and put in operation. However, on that date the company had in process of construction in various counties of the state certain other items of machinery and equipment which were

unfinished and not in operation on said date. Likewise on January 1, 1946, there were in process of construction in several different counties of the state certain items and units of machinery and equipment which were unfinished on said tax assessment date. The principal part of the property referred to in this connection was an unfinished thermal gas plant at the company's Cleveland refinery.

The appellant company in filing its combined tax returns as an inter-county corporation for the tax years above referred to, did not as to any of such tax years list any item or unit of machinery and equipment which was in process of construction and unfinished upon tax assessment day in such year. As to this the appellant company admitted that the materials which were incorporated in these unfinished items or units became the property of the company upon delivery of the same to the several grounds upon which this machinery and equipment was being constructed. And it is further conceded by the appellant that these unfinished structures, representing the labor and material which had gone into the same, had the character of personal property—so far as the question here under consideration is concerned. And there is no dispute about the fact that these several structures were constructed for the purpose and in connection with the business of the appellant which it was conducting at these several locations.

As to this, the contention of the appellant is that these unfinished items or units of machinery and equipment were not "used," within the purview of section 5328 and related sections of the General Code which generally and with respect to property of this kind, limit the taxation of tangible personal property to that which is "located" and "used in business in this state." In this connection it is noted that section 5325-1, General Code, defining the term "used in business" as well as the term "business," itself, provides:

> 'Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part

of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; * * *. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Further as to this it appears that the refinery of the appellant at its Cleveland location and likewise, presumably, those at other locations as well, consist of a number of units each of which has more or less independent functions in the manufacture of petroleum products of different kinds. Each of such units is customarily referred to in the industry as a "plant." In this view the appellant contends that an unfinished item of machinery and equipment is obviously not "a part of a plant capable of operation" within the purview of section 5325-1, General Code, and that such unfinished item was not, therefore, "used in business" under section 5328 and other sections of the General Code providing for the taxation of tangible personal property. It is to be observed, however, that the above noted provisions of section 5325-1, General Code, were not enacted with special reference to either appellant's refineries at Cleveland or elsewhere or to petroleum refineries generally in this state. And in this view recognition must be given to the general definition that in an industrial or commercial sense, a "plant" includes real estate and all else that represents capital invested in the means of carrying on a business, exclusive of raw material or the manufactured product. This leads to the conclusion that as to the refinery property of the appellant each refinery as a whole at its location in Cleveland or elsewhere is "a plant" within the meaning of section 5325-1, General Code. Inasmuch as each unfinished item of machinery and equipment here in question was a part of a refinery or "plant" capable of operation and in actual operation and was kept and maintained as such, it was property "used" and "used in business" within the meaning of the taxing statutes here under consideration.

By appropriate assignments of error in the appeals above referred to the appellant has presented to this Board ques-

tions relating to the taxable values of this unfinished machinery and equipment for the several tax years above noted. It is thought to be appropriate, however, to defer the consideration of these questions until we have considered the questions herein presented with respect to the taxable valuation of the Houdry catalytic cracking plant as a completed and operating unit for the tax years 1945 and 1946, respectively.

As above noted herein case No. 14381 on the docket of the Board includes appeals filed herein by the appellant, above noted, from final orders of the tax commissioner which modified and, as modified, confirmed an increased personal property tax assessment against the appellant for each of the tax years 1945 and 1946. One of the personal property tax units involved in this case, both as to the tax years 1945 and 1946, was the Houdry catalytic cracking plant, so-called, which was constructed primarily as a war facility for the purpose of producing high octane gasoline for aviation purposes in connection with the war effort. The construction of this plant was completed in June 1944 and the same as to the personal property comprised therein was taxable as such for said tax years as a part of the appellant's machinery and equipment at its Cleveland refinery, in Cleveland Taxing District, Cuyahoga County, Ohio. The total cost of constructing this catalytic cracking plant which consisted of a six case cracking unit, a three case cracking unit and auxiliary structures and equipment, was $9,099,360.39. The greater part of this construction work was done by the E. B. Badger and Sons Company of Boston, Massachusetts, under a contract therefor with the appellant company at a cost of $7,669,032.76; and the balance of the work in the construction of this plant or unit—which consists principally in the installation of auxiliary equipment—was performed by The Standard Oil Company itself at a cost of $1,430,327.65. The contract of the Badger Company for the work to be done by it was based on an overall definitive estimate of $5,249,930, including labor and material as well as the contractor's fee in the amount of $566,880. It thus appears that as compared with the estimate there was an overrun in that part of the work done by the Badger

Company under its contract with the appellant in the amount of $2,419,102.76. The appellant concedes that a part of this overrun amounting to the sum of $995,250 was due to additional items or other factors entering into the work done by the contractor, which were beyond that contemplated by the contract and which resulted in increased value to the completed work done by the Badger Company in the construction of this plant. Appellant contends however that the balance of said overrun, amounting to $1,423,852 represented increased costs and expenses which were occasioned by unavoidable delays in the construction of said work and by other conditions of such nature, and that these increased costs and expenses in the amount herein stated did not add anything to the value of the completed plant; and that there should be an initial deduction of this amount from the total cost of the project as one of the steps in determining the true value of the completed unit for the tax years here in question. As to this the tax commissioner apparently concedes that of the total amount of this overrun the sum of $988,000 thereof represents costs and expenses which were not reflected in the value of the completed plant or unit. This overrun allowance made by the Department of Taxation and tax commissioner was on a percentage basis which was in line with an overrun allowance theretofore made by the tax commissioner with respect to a catalytic cracking plant of like kind constructed by another oil refining company in this state in the year 1939, at which time conditions affecting construction work of the kind here in question were obviously different from the conditions which obtained during the war years when the plant here in question was constructed. Moreover, the overrun allowance made by the Department of Taxation and by the tax commissioner in the amount above stated was, apparently, limited to some extent by the erroneous view entertained in the Tax Department that the catalytic cracking plant or unit of the appellant as constructed and completed was capable of processing fifty per cent more fuel as feed stock in the production of gasoline than that contemplated by the contract based upon the estimate above referred to. As to this it appears that this catalytic crack-

ing plant as completed and put in operation then was and now is capable of processing daily 15,000 barrels of fuel oil as feed stock in the production of gasoline; and that this capacity of the plant was contemplated by the parties in the execution of the Badger Company contract for its construction. In this situation it is a matter of some difficulty to determine the amount of the overrun on the cost and expense of constructing this project due to costs and expenses which are not reflected in the value of the plant as completed for operation. However, on a consideration of all of the evidence in this case we are of the view that an allowance of $1,200,000 should be made on this account; and that a deduction of this amount should be made from the overall cost and expense of constructing the plant for the purpose of determining that part of the cost of such construction which is related to the true value thereof as a completed structure.

The appellant further contends that the construction cost of this plant as reduced by the overrun allowance should be further reduced by bringing such cost down to the construction cost level for the year 1939, which year, the appellant assumes, was the last year in which construction costs were reasonably normal. The construction work on this project was largely done in the year 1943, at which time construction costs, the appellant claims, were abnormally high as compared with those for the year 1939. In this connection it appears from the evidence (appellant's exhibit 15) that taking the figure 100 as the index basis for construction cost in the year 1913 the index for construction costs for the year 1943 was 290 and that for the year 1939 was 236; which last named index figure is 81.4% of that for the year 1943. And appellant's contention is that this percentage should be applied to the net cost of the construction of the plant as above determined for the purpose of bringing such cost down to the 1939 level as an index to the true value of the plant as constructed. As to this it is noted from the evidence that following the year 1939 and through the war years there was a steady and substantial increase in construction cost, and that following the end of the war there was a tremendous increase in construction cost; so that during the year 1947

the index for such cost for said year on the basis above noted was about 390 as compared with the index figures given with respect to the years 1939 and 1943. And based upon information readily available in engineering journals and other like sources, judicial knowledge can be taken of the fact that construction costs for the years 1948 and 1949 were substantially higher than those for the year 1947. It is apparent that construction cost during the latter part of the year 1942, during the year 1943 and during the first half of the year 1944, during which time this plant was under construction, were substantially less than the average of such construction costs from the year 1939 to 1949, inclusive. In this situation and inasmuch as no one can readily foresee the time when construction costs will be comparable to those for the year 1939 or to those for the year 1943, for that matter, we are of the view that consistently with the rule that in the determination of true value of a fixed asset of this kind such value should be considered as something fairly constant over a period of time, and that while the assessment of such property is made as of a day certain the value thereof is established over a period of years, we can without injustice to the appellant take the actual net construction cost of this catalytic cracking plant as above determined as an index of its true value for tax purposes. In this view appellant's contention that the actual net cost of this plant should be reduced to the 1939 cost level, must be denied.

Giving effect to the figures above found and determined and deducting $1,200,000 as the amount of the overrun from $9,099,360, the overall cost of the Houdry catalytic cracking plant, we obtain $7,899,360 as a figure representing that part of the cost of the plant contributing to the value of the plant as completed. As to this it appears, however, that 10.6% of this cost amounting to $837,332, was for the construction and installation of structures and equipment which were properly classified as real property. Deducting this sum from $7,899,360 leaves us $7,062,028 as that part of the cost which is reflected in the value of the plant as personal property. It further appears, however, that of the amount last named the sum of $135,000 represents the cost of constructing foundations for an additional three case cracking unit

as a part of the plant, which was never completed; and which foundations, as idle equipment were given a value of $13,500 instead of $135,000, the cost of constructing the same. Making a proper adjustment of these figures we arrive at a valuation of the plant as personal property as of July 1, 1944, in the amount of $6,940,528. Giving to this figure as the valuation of the plant as of July 1, 1944, a depreciation of 5%, amounting to $347,026, we determine the true valuation of the plant as personal property on and as of tax listing date, January 1, 1945, to be $6,593,502.

A further question presented in this case with respect to the assessment of appellant's machinery and equipment in Cleveland City Taxing District for the tax year 1945—including, of course, the Houdry Catalytic cracking plant above referred to—is on an assignment of error that the tax commissioner on consideration of the appellant's application for review and redetermination as to the assessment complained of did not allow a reduction of the valuation of such machinery and equipment to or under the book value thereof notwithstanding the fact that the appellant did not for said tax year file any (902) claim as authorized and provided for by section 5389, General Code. As to this it appears that the appellant in filing its inter-county or consolidated personal property tax return for the tax year 1945 set out its machinery and equipment in Cleveland City Taxing District at a book valuation of $10,591,041. However the appellant did not in said tax return list this property as machinery and equipment used in manufacturing at a 50% valuation based on the book value of the property; but it did list this property at a 50% valuation based upon the true value of this machinery and equipment, which true value was set out in said tax return as $11,491,043, and which true value as returned by appellant was apparently the book value of this machinery and equipment as depreciated in accordance with the 302 formula prescribed by the tax commissioner which had been in effect for some years. And it further appears in this connection that the appellant paid the taxes for said tax year on this machinery and equipment on a list or assessed valuation based on this true value of the property as returned by the appellant. And apparently,

the appellant paid the taxes on its machinery and equipment in this taxing district upon an assessment certificate directed to it and to the county auditor by the tax commissioner under date of August 13, 1945, after the tax commissioner had made an audit of appellant's tax return for said year. In this assessment certificate the tax commissioner set out the *assessed value* of all of the appellant's tangible personal property in Cleveland City Taxing District at $8,684,960. And in making this assessment certificate it does not appear that the tax commissioner in making his audit of appellant's tax return increased or otherwise changed either the true valuation or list valuation of appellant's machinery and equipment in said taxing district as the same were set out in said tax return. Thereafter on February 11, 1947, the tax commissioner on reaudit of appellant's personal tax return for the year 1945 increased the *assessed* valuation of all of the appellant's tangible property in Cleveland City Taxing District from $8,684,960, as above stated, to $8,887,540—an increase of the list or assessed valuation of such property in the amount of $202,580. It does not appear, however, that the tax commissioner in making this increase in the *list* or assessed valuation of appellant's tangible personal property in Cleveland City Taxing District increased or otherwise changed the valuation of appellant's Houdry catalytic cracking plant or other machinery and equipment in the taxing district. On the contrary it appears that this increase in the list or assessed value of such tangible personal property was due solely to an adjustment and resulting increase made by the tax commissioner in the valuation of the appellant's inventory property at this location.

Following the receipt of this amended certificate of valuation made by the tax commissioner, the appellant on March 12, 1947, filed with that officer an application for review and redetermination of said amended assessment in which no complaint is made as to the only increase made in and by said amended assessment, but in which, among other things, the appellant said:

"Our claim is that the aggregate assessed value of tangible property in Cleveland, shown on the amended

preliminary assessment certificate as $8,887,540.00 should be reduced by $2,373,630.00 since the listed value of the machinery and equipment at the Catalytic Cracking Plant in our Cleveland refinery should be not $3,873,636, the amount for which it was assessed in the amended preliminary assessment certificate, but $1,500,000.00."

Assuming that the *list* or *assessed* value of the Houdry catalytic cracking plant was $3,873,636, as stated by the appellant in its application for review and redetermination, it follows that since this catalytic cracking plant as machinery and equipment used in manufacturing was listed at 50% of its true value both in the amended assessment certificate and in the original assessment certificate, the true value of this catalytic cracking plant as the same was returned for taxation by the appellant as a part of all its machinery and equipment in the Cleveland City Taxing District must have been $7,747,272.

In this situation it appeared when this application for review and redetermination came on for consideration by the tax commissioner that the true value of all the machinery and equipment owned and used by the appellant in refining in Cleveland, Cuyahoga County, and upon the basis of which the appellant paid taxes on such property for the year 1945, was $900,002 more than the book value of such machinery and equipment as returned by the taxpayer for said year. The tax commissioner upon consideration of the application for review and redetermination found that the catalytic cracking plant above referred to was "assessed in excess of the true value thereof in the amount of $988,000 by reason of allowable excessive costs and equipment not in use but that in view of the judicial determination (Willys-Overland Motors, Inc. v. Evatt, 141 O. S., 402) he is without jurisdiction to find a value below net depreciated book value and orders that the value of such property be reduced in the amount of $561,027.00 being the amount that the machinery and equipment used in manufacturing in Cuyahoga County exceeded the net depreciated book value thereof, and it is ordered that a final assessment certificate issue correcting the assessment in

the amount so stated." This figure of $561,027, above noted, was the amount by which the true value of all machinery and equipment used by the appellant in refining throughout the state as the same was returned by the appellant exceeded the book value thereof as set out in appellant's tax return. And the tax commissioner, apparently, used this figure in making the reduction above noted instead of the figure of $900,002 as intended. The tax commissioner after giving effect to the reduction made by him as above noted and after making certain increases in the valuation of this machinery and equipment in the aggregate amount of $47,425 due to an adjustment of depreciation rates as to some items of such property and to the valuation of certain items of machinery and equipment in progress of construction, fixed the valuation of such machinery and equipment in Cleveland Taxing District in the sum of $10,977,441.

Although the tax commissioner on the consideration of the appellant's application for review and redetermination had no jurisdiction and authority to reduce the valuation of this machinery and equipment below the book value thereof in the absence of a 902 claim for such reduction, Willys-Overland Motors, Inc. v. Evatt, Tax Commr., 141 O. S., 402; Wright Aeronautical Corp. v. Glander, Tax Commr., 151 O. S., 29, said officer upon his finding of an overrun in the cost of constructing said catalytic cracking plant, would have been warranted in reducing the valuation of the machinery and equipment in this taxing district down to the sum of $10,591,041, the book value thereof, were it not for the fact that the appellant had previously paid taxes on this property at a higher valuation. As to this it will be recalled that the appellant returned this machinery and equipment for taxation at a true valuation of $11,491,043 including, apparently, said catalytic cracking plant at a valuation of $7,747,272; and taxes were paid by the appellant for the tax year 1945 on the basis of this true value of the property as returned by the taxpayer. In this situation the question presented to the Board of Tax Appeals upon this appeal as to the right of the taxpayer to a reduction in the valuation of this machinery

and equipment from the valuation of $11,491,043, at which it was returned by the appellant for purposes of taxation to the sum of $10,591,041, the book valuation of this property, is a moot question which this Board is not authorized or required to determine. The Central Iron and Metal Co. v. Evatt, 27 O. O. 1. See Board of Education v. Budget Commission, 139 O. S. 312, 313; Minor v. Witt, 82 O. S. 237; Travis v. Public Utilities Commission, 123 O. S. 355. It follows, therefore, that the final order made by the tax commissioner on appellant's application for review and redetermination (assuming, but not deciding, that said application was timely and properly filed) with respect to the true valuation of appellant's machinery and equipment including said catalytic cracking plant in Cleveland City Taxing District for the tax year 1945, must be, and hereby is, affirmed; and this notwithstanding the fact that, as above noted, this Board has herein found and determined that the true value of said catalytic cracking plant on and as of January 1, 1945, was substantially less than the valuation at which this plant was returned for taxation and upon which the taxes were paid.

A further question presented in case No. 14381 is on an appeal by the appellant from a final order of the tax commissioner on appellant's application for review and redetermination with respect to the valuation of said Houdry catalytic cracking plant for the tax year 1946. As to this it appears that the appellant in its personal property tax return for the tax year 1946 returned its machinery and equipment in Cleveland City Taxing District at a true value of $4,082,711; which valuation did not include that of the Houdry catalytic cracking plant, the cost of which plant as a war facility had been depreciated or amortized down to zero on the books of the company. However, the 902 claim filed by the appellant with its tax return states that the valuation of the machinery and equipment in the Cleveland Taxing District as returned by the appellant "should be increased by $3,000,000 to reflect and include the true value of the Houdry unit." On August 12, 1946, the tax commissioner issued a preliminary assessment cer-

tificate on and with respect to the tangible personal property returned for taxation by the appellant for said tax year. Thereafter, on or about the month of December 1946, the tax commissioner made a reaudit of appellant's tax return for said year in which that officer found and determined that the true value of said catalytic cracking plant for the tax year 1946 was $6,916,129; and adding this amount to the valuation of the machinery and equipment other than said catalytic cracking plant returned by the appellant as aforesaid, the tax commissioner determined the true valuation of appellant's machinery and equipment in the Cleveland Taxing District to be $10,998,840. Following this reaudit the tax commissioner made and certified an amended assessment certificate including therein the assessed value of the Houdry plant as determined on said audit. Following the certification of this amended preliminary tax assessment the appellant filed with the tax commissioner an application for review and redetermination in which it stated that the true value of the machinery and equipment in the catalytic cracking unit, as of January 1, 1946, was $3,000,000, and that it should accordingly be included in its 1946 personal property tax assessment at a listed value of $1,500,000 instead of $3,458,060, the listed value at which the tax commissioner included it in his amended preliminary assessment certificate.

The tax commissioner upon consideration of appellant's application for review and redetermination allowed a reduction of $932,360 from the cost of the construction of said catalytic cracking unit by reason of excessive costs not contributing to the value of the unit; and giving effect to such reduction in the original cost of the construction of this unit, the tax commissioner determined that this catalytic cracking plant or unit had a valuation on and as of January 1, 1946, of $5,983,769. And the tax commissioner after including certain machinery and equipment which the appellant had failed to list in its tax return, some of which was in process of construction, determined that all of the appellant's machinery and equipment in Cleveland Taxing District had a valuation of $10,960,267 for the tax year 1946.

On the presentation of this case to the Board of Tax Appeals on this appeal, the appellant upon considerations above discussed and to some extent denied herein contends that this Houdry catalytic cracking plant as personal property on and as of the time of the completion thereof, July 1, 1944, had a valuation of $5,589,707. In the determination of the valuation of this plant for the tax year 1946 the appellant contends on the basis of some supporting evidence that 60% of the cost of constructing this plant consisting, as above noted, of a six case cracking unit and a three case cracking unit, was attributable to the six case cracking unit, and that 40% of the total cost was in the construction of the three case cracking unit. With this assumption the appellant ascribes a valuation to that part of the plant as personal property other than the three case unit and the foundations for the addition cases which were never constructed, or $3,353,824. Giving this stated valuation a depreciation of 15%, amounting to $503,073, the appellant determines the true value of the personal property in the Houdry plant other than the three case unit and the additional foundations a value of $2,850,751 as of January 1, 1946.

Further in this connection the appellant contends that aside from the fact, as claimed, that this Houdry catalytic cracking plant, which was of the fixed-bed catalytic type, was to some extent outmoded by January 1, 1946, by reason of the development and use in the industry of the fluid type of catalytic plant, the three case unit, it is contended, became obsolete on the termination of the war; and this for the reason, as claimed, that this unit was no longer needed for making high octane gasoline for aviation purposes and appellant could have refined motor vehicle gasoline more economically by the use of its thermal cracking unit and the six case cracking unit without making any use of the three case unit. And in this view the appellant contends, in effect, that the only value that the three case unit had on January 1, 1946, was such value as the unit might have in the contemplated conversion of the same into a catalytic cracking unit of the fluid type; and that the value of the three case unit was between $700,000 and $1,000,000.

Grouping this three case unit and the foundations of the once projected but never finished additional three case unit together, the appellant ascribes a value to the same of $1,000,000. Adding this sum to the determined true value of personal property in the Houdry plant other than the three case unit and such additional foundations, the appellant determines the true value of the Houdry catalytic plant as of January 1, 1946, to be $3,850,751.

In the consideration of the immediate question here presented it is noted that although this three case cracking unit in its normal operation processed a considerable quantity of virgin feed stock obtained both from the crude and vacuum pipe stills operated by the company at this refinery, the greater amount of feed stock which went into the three case unit was that which was obtained as an end product from both the thermal and six case cracking units; and that the chief purpose of the three case unit was to give the gasoline processed by it a higher octaine quality than the gasoline produced in either the thermal cracking unit or in the six case catalytic cracking unit. In this connection it appears from the evidence (appellant's exhibit 25A) that during the calendar year 1945, including nine months of the war period, the amount of feed stock of various kinds processed in this three case catalytic cracking unit was 4601 barrels; in the calendar year 1946, 4291 barrels; in the calendar year 1947, 4096 barrels; and during the first six months of the calendar year 1948, 3820 barrels. It appears that although following the end of the war there was a marked decrease in the demand for aviation gasoline there was at that time a greater increase in the demand for gasoline for motor vehicle use. And in meeting this demand the company as late as June 1948 was making a more active use of this three case cracking unit than was made of it during the last of the war years. In this situation the Board is not impressed by the contention of the appellant that on and as of January 1, 1946, this three case unit was obsolete and that it had no valuation other than such as it might have for conversion purposes. On the contrary we are of the view that on January 1, 1946, as on January 1, 1945, this three case unit should be consid-

ered as a part of the Houdry catalytic cracking plant as a whole and as an operating unit thereof.

Coming to the determination of the value of the Houdry catalytic cracking plant as personal property for the tax year 1945 and as of January 1 in said year, the Board has found herein that the value of the plant on and as of July 1, 1944, was and is the sum of $6,940,528. Giving to this valuation a depreciation of 15% covering the period of time between July 1, 1944, and January 1, 1946, and amounting to $1,041,089, the Board determines the value of this plant on and as of January 1, 1946, to be $5,899,439. Inasmuch as this valuation of the plant is slightly less than that determined by the tax commissioner in the final order complained of herein such final order is hereby modified in order to conform to the finding of the Board with respect to the valuation of this plant.

As before indicated herein the appellant's findings in cases Nos. 12488 and 14381 present questions relating to the assessment of certain unfinished machinery and equipment which was in process of construction at the appellant's Cleveland refinery on tax listing day for the tax years 1943, 1944, 1945 and 1946, respectively. As to the tax years 1943 and 1944, the only property of this kind here in question was the then unfinished Houdry catalytic cracking plant or unit, above referred to; and as to the tax years 1945 and 1946, the property in question was certain other capital equipment which was unfinished and in the process of construction on tax listing date in said respective years.

Upon considerations relating to the construction and application of sections 5328 and 5325-1, General Code, the appellant contends, as before noted, that personal property of this kind is not taxable at all; and, in the alternative, the appellant further contends that if it is determined that this property is taxable, it should be assessed, not as machinery and equipment, but either on the average basis as personal property of a manufacturer within the purview of sections 5385 and 5386, General Code, or as "idle equipment" and at 10% of the cost thereof pursuant to the tax commissioner's directive under date of May 6,

1943, relating to the assessment of property in this category. As before noted, the Board is of the view that the property here in question is taxable. And it remains for us to determine the manner in which this property should be assessed and the valuation of the same for purposes of taxation in said respective tax years. Appellant's contention that personal property of a manufacturer of this kind and in this condition should be assessed on the average basis provided for by sections 5385 and 5386, General Code, is predicated on the stated view that clause 4: "When stored or kept on hand as material, parts, products or merchandise" as the same is found in section 5325-1, General Code, defining the term "used" within the purview of section 5328, General Code, providing for the taxation of personal property "used in business," is intended to cover inventories of all kinds, and is coextensive with section 5385, General Code, which provides for the assessment on the average value basis: "* * * of all articles purchased, received or otherwise held for the purpose of being used, in whole or in part, in manufacturing combining, rectifying or refining, and of all articles which were at any time by him manufactured or changed in any way, * * *." As to this, we are of the view that the "articles" referred to in the above quoted provisions of section 5385, General Code, refers solely to articles from which and out of which the manufactured products are made—that is, the manufacturer's raw material or stock—Sebastian v. Ohio Candle Co., 27 O. S., 459, 463; Engle v. Sohn, 41 O. S., 691, 693; Commissioners v. Rosche Bros., 50 O. S., 103, 109; and the "articles" therein referred to do not, in our opinion, include machinery, tools or other equipment by means of which such articles as the manufacturer's raw material or stock are transformed, changed or otherwise used in the manufacture of the finished product. In this connection it is noted that section 5386, General Code, which makes provision as to the manner in which the average value of the personal property of the manufacturer, so assessed is to be determined, further provides as follows:

> "A manufacturer shall also list all engines and machinery of every description used, or designed to be

used, in refining or manufacturing, and all tools and implements of every kind used, or designed to be used, for such purpose, owned and used by such manufacturer."

This statutory provision is not only persuasive to the view that the property here in question which is "designed to be used" in refining and manufacturing, is taxable, but, read with the applicable provisions of section 5388, General Code, this provision leads to the view that property of this kind is to be assessed, not on the average value thereof, but upon the true value thereof as of tax listing day, and is to be listed at 50% of such true value.

The appellant further contends that if this unfinished machinery and equipment is not assessable on the average value thereof under the provisions of sections 5385 and 5386, General Code, then and in that event this property should be assessed as idle equipment at 10% of the original cost thereof under a directive of the tax commissioner under date of May 6, 1943, which is as follows:

"Subject: Valuation of Idle Equipment: Dated 5/6/43:

Such equipment shall, under certain conditions, be listed at 10% of original cost; such cost to include that of foundation and installation.

Temporary idleness for purpose of overhauling and repair or resulting from seasonable operations is not sufficient cause.

Equipment ordinarily entitled to such listing would be that in buildings boarded up, in departments closed off, or removed from production line.

To receive such consideration, the taxpayer must file a claim, in writing, at the time of filing the return.

Such claim should show cost and value as listed in the return and other necessary information in support of the claim."

As to the contention of the appellant it may be observed that aside from the question (not here decided) as to the authority of the tax commissioner to make and issue this directive—it is not a rule—in view of the requirement that

machinery and equipment is to be assessed on the basis of the true value thereof and listed at 50% of such true value, and aside from the obvious view that the property here in question does not come within either the letter or purpose of this directive, the appellant can not in these cases avail itself of this directive for the purpose intended, and this for the reason it did not in making its tax returns for the several tax years here in question make any claim that this property should be taxed as idle equipment.

It follows from what has been said that the Board is of the view that this unfinished machinery and equipment here in question is to be taxed as personal property and as is other machinery and equipment on the basis of the true value thereof on and as of tax listing day of the several tax years above referred to, and is to be assessed at a list valuation of 50% of such true valuation as prescribed by section 5388, General Code. As above noted, the only personal property of this description which is involved in this case with respect to the tax years 1943 and 1944 is the then unfinished Houdry catalytic cracking plant. As to this it further appears that on and as of January 1, 1943, the overall cost of that part of the plant represented by the personal property therein was $435,000. In this case it is noted that the Board in determining the true valuation of the then completed Houdry plant on and as of July 1, 1944, deducted from the overall cost of the plant that part thereof represented by excessive costs and expenses of the construction which did not contribute to the value of the plant, which excessive costs and expenses amount to $1,200,000—about 13.2% of the overall cost of the plant. Applying as a deduction the same percentage of overrun to the overall cost of the unfinished structure on and as of January 1, 1943, we determine the true value of the plant as of said date to be $377,580 (list value $188,790). On and as of January 1, 1944, the overall cost of the plant as personal property was $6,220,575. Deducting from this sum the same percentage of overrun for excessive costs and expenses in construction, the true value of the plant as of said date is determined to be the sum of $5,399,459 (list value $2,699,729). By January 1, 1945, the Houdry catalytic cracking

plant had been completed and was then in operation. However, the appellant company had at that time certain other unfinished equipment which was in progress of construction and to which the tax commissioner ascribed a true value for said tax year of $80,652, of which $41,716 was the value of that part of the property which was intended for use in manufacturing and which was assessed at 50% of such value, and $38,936 was regarded as the value of that part of the unfinished equipment which was intended for use other than manufacturing, and which was assessed at 70% of such value. There is nothing in the evidence to show that there was any overrun on account of excessive costs and expenses in the construction of this unfinished equipment; and the valuation placed upon the same by the tax commissioner is hereby determined to be correct. On January 1, 1946, the appellant had in process of construction certain then unfinished equipment the cost of which up to that time was $928,686 of which $904,651 represented the then cost of machinery intended to be used in manufacturing and which was assessed at 50% of such valuation and $24,055 represented that part of the unfinished equipment which was intended to be used for other purposes and which was assessed at 70% of valuation. There is no suggestion in the evidence than any part of the cost of constructing this equipment was due to an overrun of excessive costs and expenses not contributing to the value of the equipment. And the order of the tax commissioner determining the true value of the equipment in accordance with the figures above stated is hereby affirmed. Inasmuch as the true valuation of the unfinished Houdry catalytic cracking plant on and as of January 1, 1943, and January 1, 1944, respectively, as here determined, are somewhat less than the valuations of said property as of said respective dates, the order of the tax commissioner determining such valuations is hereby modified so as to conform to the findings of the Board. As to the unfinished equipment of the appellant which was in progress of construction on January 1, 1945, and January 1, 1946, the true valuations thereof as determined by the tax commissioner are hereby affirmed.

Case No. 14514, herein before referred to, is an appeal filed herein by the appellant above named under date of June 17, 1948, from a final assessment made by the tax commissioner under date of May 19, 1948, under the assumed authority of section 5395, General Code, on and with respect to tangible personal property of the appellant for the tax year 1945 including machinery and equipment and other tangible personal property at Cleveland refinery in Cleveland City Taxing District, Cuyahoga County, Ohio, the assessment of which property for said tax year as modified on the appellant's application for review and redetermination was confirmed by the tax commissioner by a final order of the tax commissioner under date of April 14, 1948, and from which order said appellant filed an appeal with this Board under date of May 13, 1948; which appeal was docketed as one of the appeals in case No. 14381, and is considered and determined herein. By reason of the provisions of section 5395, General Code, which excludes from the list of taxable property as to which a final assessment may be issued under the authority of this section "any taxable property concerning the assessment of which an appeal has been filed under section 5611 of the General Code," the Board is of the view that the tax commissioner was without authority to issue this final assessment on and with respect to machinery and equipment and other tangible property of the appellant in Cleveland City Taxing District, which was the subject of the appeal filed herein in case No. 14381, above referred to, and in this respect the final assessment and assessment certificate of the tax commissioner under date of May 19, 1948, is reversed, set aside and held for naught. This order is without prejudice to the issues with respect to the assessment of said personal property as the same has been considered and determined on the appeal for the tax year 1945 filed herein under date of May 13, 1948.

Except as otherwise indicated herein the orders and assessments complained of in these several appeals are affirmed; and the several cases above noted are remanded to the tax commissioner with directions to make and issue corrected assessment certificates in conformity with the findings and determinations of the Board made herein.

See memo attached.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation of Ohio this day made with respect to the above matter.

JOSEPH D. BRYAN,
Secretary.

[SEAL.]

SHERICK:

I concur in all matters decided, save and except that portion of the first question presented and determined, which has to do with the taxation of boats and barges transporting crude oil between Mississippi river points and Mt. Vernon, Indiana, and Bromley, Kentucky. Since the State of Kentucky owns to the north shore of the Ohio river at low water mark, and these boats and barges never docked in Ohio ports, such boats and barges never entered the State of Ohio during the taxing period. I am of equally firm opinion that the Board of Tax Appeals has no power or authority to declare all or any part of an Act of the Legislature unconstitutional. I feel that taxation of these vessels can only be sustained upon the words *"in navigating any of the waters* within or *bordering on this state, whether such ships, vessel, or boat is within the jurisdiction of this state or elsewhere,"* as found in G. C. Section 5325. To my notion any such purpose and intent to tax tangible personal property has already been held unconstitutional in the case of Floyd v. Light and Heat Co., 111 O. S., 57. The court therein was considering G. C. Section 5424 and the right, purpose and intent of the State of Ohio to tax tangible personal property sitused outside of Ohio. In broad and general terms the court therein said at pages 74 and 75:

> "Another important principle to be observed is that which forbids *any attempt* to levy taxes upon property beyond the territorial boundaries of the state. This is

a *general principle which has application to all forms of taxation.*"

"Upon principle as well as upon the authority of these cases we adhere to the doctrine that in the construction of Section 5424, General Code, *there must be no taxation of property not 'within this state.'*"

I fully realize that these observations are not carried into the syllabi, but the statements made are so uniformily the law of the land, and so broad and comprehensive in scope in condemning any such legislative purpose, intent and design in any statute enacted to that end, that what is therein said is as fully applicable to G. C. Sec. 5325 as it was to G. C. Sec. 5424. The very principle sought to be accomplished in G. C. Sec. 5325 was found therein not to be able of accomplishment. The words "*any attempt*" to my notion are synonymous with "*any statute which attempts.*"

I feel fortified in my conclusion by the statement of the court made in Columbus Met. Housing Auth. v. Thatcher, Aud., 140 O. S., 38. The court therein had this to say, on page 43 thereof, concerning the omission of the word "exclusively" from G. C. Sec. 5351, an exemption statute:

"The word 'exclusively' may not be read out of this section (5351) and *any statute which intentionally disregard this feature would be unconstitutional.*"

EXHIBIT D

Entry of the Tax Commissioner of Ohio—1945

DEPARTMENT OF TAXATION OF OHIO

No. 3,327

In the matter of the application for review and redetermination of THE STANDARD OIL COMPANY, Cleveland, Ohio, (Inter-County) for the year 1945.

April 14, 1948.

The application for review and redetermination of The Standard Oil Company, Cleveland, Ohio, an inter-county corporation, from an increased personal property tax assessment for the year 1945, after being duly heard, came on to be considered.

The Tax Commissioner being fully advised in the premises, finds that for the year 1945 assessment was made increasing the value of both personal property and intangible property over and above that as listed by the applicant as to items and amounts as follows:

Item	*Amount of Increase*
1. Average inventory values	$ 852,013.00
2. Net taxable credits	1,354,230.00

The Tax Commissioner finds that the average inventory values were increased by reason of the fact that applicant determined the values as listed under the "Lifo" or, last-in, first-out method, and by reason of such fact the values as listed and returned did not reflect true value and finds that the true value of said inventory for such year is as reflected in the increased assessment and said assessment as to the values so determined is hereby affirmed.

The Tax Commissioner further finds that the increase in net taxable credits over and above those as returned by said applicant was due principally to the fact that the applicant deducted taxes and annuities in determining the

net taxable credits as so listed and finds that the deduction thereof by the applicant was in error and such assessment as to the increase in net taxable credits is hereby affirmed.

The Tax Commissioner further finds that applicant listed watercraft (boats and barges) at the depreciated book value thereof in the amount of $1,017,518 but finds that by reason of excessive reserves having been accumulated the true value of said property was in excess of that as returned and finds that the true value of boats and barges taxable in Ohio for 1945 was $1,322,863.00.

Applicant did not file a claim for deduction with respect to said boats and barges at the time of making return, but in its application for review protested the assessment of said property on the basis that such property was not taxable in Ohio.

The Tax Commissioner finds that watercraft and aircraft belonging to persons residing in this state and not used in business wholly in another state are taxable in Ohio and orders that the true value of boats and barges in the amount of $1,322,863.00 be reflected in the final assessment certificate hereinafter ordered.

The Tax Commissioner being further advised in the premises, finds that personal property of the applicant other than boats and barges was listed at less than the true value thereof for the year 1945 in certain taxing districts, partially by reason of excessive reserves having been accumulated and partially by reason of applicant's failure to include in such listing, personal property in the process of construction and finds that the true value of personal property not returned by reason of excessive reserves was $739,022.00 and that $681,157.00 of such amount was personal property used in manufacturing and that $57,865.00 was personal property used other than in manufacturing, and that the true value of personal property in the process of construction and not returned was $41,716.00 for use in manufacturing and $38,936.00 for use other than in manufacturing.

The Tax Commissioner further finds that applicant listed personal property in the aomunt of $15,052,922.00 which

was $561,027.00 more than the net book value thereof and included in such listing in Cleveland district was machinery used in manufacturing consisting of a catalytic cracking unit.

Applicant in its review and redetermination and evidence submitted in support thereof maintains that in the valuation of its catalytic cracking unit the Tax Commissioner should make an allowance for excessive costs and also an allowance for the general inflated level of the cost index during the war emergency and further contends that by reason thereof the true value of such unit is $3,000,000.00 as of January 1, 1945. Applicant further contends that its boats and barges are not subject to personal property taxation under the Ohio laws.

The Tax Commissioner, being further advised in the premises, and consideration having been given to the claims made and evidence submitted by the applicant in support of said application for said year, finds that there is no authority in law or in long established administrative procedure for recognizing increased costs due to price increases in the determination of true value of personal property used in business; and that the claim of applicant in this regard should be and hereby is denied.

The Tax Commissioner finds that applicant at the time of filing its return did not file a claim in writing as provided in Section 5389, General Code, with respect to its machinery and equipment to the effect that the net depreciated book value was in excess of true value.

The Tax Commissioner further finds that the catalytic cracking unit was assessed in excess of the true value thereof in the amount of $988,000.00 by reason of allowable excessive costs and equipment not in use but that in view of the judicial determination (Willys-Overland Motors, Inc. *v.* Evatt, 141 O. S. 402) he is without jurisdiction to find a value below net depreciated book value and orders that the value of such property be reduced in the amount of $561,027.00 being the amount that the machinery and equipment used in manufacturing in Cuyahoga County exceeded the net depreciated book value thereof, and it is ordered that final assessment certificate issue correcting the assess-

ment in the amount so stated. In all other respects the assessment as to machinery and equipment is hereby affirmed and the Tax Commissioner finds that in the districts in which such incorrect listings were made or corrected herein, the true value of personal property used in manufacturing and used other than in manufacturing for such year, including boats and barges, was as follows:

		Amended True Values
Used in Manufacturing		
Allen County	—Shawnee Twp. Sch.	$794,961
	—Lima	365
Cuyahoga County	—Cleveland	10,977,441
Lucas County	—Oregon Twp.	3,442,001
Used Other Than In Manufacturing		
Cuyahoga County	—Cleveland	1,328,712
Portage County	—Randolph Twp.	6,306
	—Suffield Twp.	49,338
Summit County	—Franklin Twp. E. Sch.	15,650
	—Franklin Twp. W. Sch.	44,266
	—Green Twp.	34,656
	—Springfield Twp.	15,836
Wayne County	—Chippewa Twp.	18,436
Hancock County	—Washington Twp. Arcadia SD	20,414
Allen County	—Lima	42,502
Belmont County	—Martins Ferry	19,301
Carroll County	—Center Twp. Carrollton SD	211
Cuyahoga County	—Cleveland	635,891
Fayette County	—Washington C. H.	5,867
Callia County	—Gallipolis	11,701
Hamilton County	—Cincinnati	251,219
Mahoning County	—Youngstown	47,393
Muskingum County	—Zanesville	9,859
Richland County	—Mansfield	27,516
Summit County	—Akron	124,678
Other Counties	—Various	3,243,832

The Tax Commissioner, therefore, orders that final assessment be made for the year 1945 in conformity with and reflecting the findings herein.

Department of Taxation,
(Sgd.) C. EMORY GLANDER,
Tax Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the Department of Taxation, this day taken by the Tax Commissioner with respect to the above matter.

(Sgd.) C. EMORY GLANDER,
Tax Commissioner.

EXHIBIT E

Entry of the Tax Commissioner of Ohio—1946

DEPARTMENT OF TAXATION OF OHIO

No. 3276

In the matter of the application for review and redetermination of THE STANDARD OIL COMPANY, Cleveland, Ohio (Inter-county) for the year 1946

April 13, 1948.

The application for review and redetermination of The Standard Oil Company, Cleveland, Ohio, an inter-county corporation, from an increased personal property tax assessment for the year 1946, after being duly heard, came on to be considered.

The Tax Commissioner, being fully advised in the premises, finds that as to the year 1946 said applicant filed its return and thereafter increased assessment was made for such year and that such assessment reflected increases over and above those as returned by said applicant in the following respects:

Item	*Amount of Increase*
1. Average inventory values	$ 935,314.00
2. Net taxable credits	1,567,900.00

The Tax Commissioner finds that the average inventory values were increased by reason of the fact that applicant determined the values as listed under the "Lifo" or, last-in, first-out method, and by reason of such fact the values as listed and returned did not reflect true value and finds that the true value of said inventory for such year is as reflected in the increased assessment and said assessment as to the values so determined is hereby affirmed.

The Tax Commissioner further finds that the increase in net taxable credits over and above those as returned by said applicant was due principally to the fact that the

applicant deducted taxes and annuities in determining the net taxable credits as so listed and finds that the deduction thereof by the applicant was in error and such assessment as to the increase in net taxable credits is hereby affirmed.

The Tax Commissioner further finds that applicant listed machinery and equipment in Cuyahoga County for the year 1946 in the amount of $4,082,711.00 and that thereafter amended assessment certificate was issued in which the value of the machinery and equipment was increased over and above that as returned in the amount of $6,916,129.00, such increase being due to the failure of the applicant to list machinery and equipment consisting of a catalytic cracking unit; such unit having been fully reserved on the books of the applicant. Applicant also failed to list personal property with a true value of $741,979.00 by reason of excessive reserves having been accumulated and of which $938.00 was used in manufacturing and $163,868.00 was used other than in manufacturing and $577,173.00 was boats and barges. Applicant also failed to list personal property with a true value of $928,686.00 which was in the process of construction of which $904,651.00 was to be used in manufacturing and $24,035.00 was to be used other than in manufacturing.

At the time of filing its return, applicant filed a claim for deduction from book value in words and figures as follows:

		Schedule 2
"Cleveland City, Book Value		$3,142,425.00
Totals	Book Value	3,142,425.00
	Deduction Claimed	—
	Claimed True Value	6,991,741.00

"The depreciated book value figure of $3,142,425 given in Item 1 represents the depreciated book value of the Cleveland Refinery machinery and equipment shown on Schedule 2 of the return and includes the Catalytic Cracker (Houdry unit) at Cleveland at a book value of ZERO, for the reason that the book value of this unit through depreciation (including amortization) was reduced to ZERO by January 1, 1946. Should

the depreciated book value of this Houdry Unit be properly deemed higher than ZERO within the meaning of G. C. 5389, then the figure of $3,142,425.00 is to be treated as increased by such excess over ZERO, and the deduction claimed shall be not ZERO, but the excess of such increased figure over the true value of the refinery personalty of $6,991,741 above mentioned.

"The supporting data with respect to the above claim are already in the possession of the Department of Taxation.

"Statement Forming Part of the Return

"In connection with the return to which this is attached we wish to call attention to the fact that the return shows a total true value for the Cleveland Refinery machinery equipment in Schedule 2 of $3,991,741. This amount should be increased by $3,000,000 to reflect and include the true value of the Houdry unit above mentioned bringing the aggregate true value of Schedule 2 to $6,991,741.00."

Applicant maintains that in the valuation of its catalytic cracking unit the Tax Commissioner should make an allowance for excessive costs and also an allowance for the general inflated level of the cost index during the war emergency and further contends that by reason thereof the true value of such unit is $3,000,000.00 as of January 1, 1946. Applicant further contends that its boats and barges are not subject to personal property taxation under the laws of Ohio.

The Tax Commissioner, being further advised in the premises, and consideration having been given to the claims made and evidence submitted by the applicant in support of said application for said year, finds that there is no authority in law or in long established administrative procedure for recognizing increased costs due to price increases in the determination of true value of personal property used in business; and that the claim of applicant in this regard should be and hereby is denied.

The Tax Commissioner further finds that in the amended assessment certificate heretofore issued the catalytic cracking unit was assessed in excess of the true value thereof in the amount of $932,360.00 by reason of allowable excessive costs and equipment not in use and finds that the true value of said catalytic cracking unit as of January 1, 1946 was $5,983,769.00 and further finds that boats and barges were properly assessed as having taxable situs in Ohio and likewise finds that there was no error in the assessment of the personal property which taxpayer failed to list by reason of excessive reserves having been accumulated and further finds that there was no error in the assessment of personal property in the process of construction and the assessment as heretofore made as to such property is hereby affirmed.

In view of the foregoing, the Tax Commissioner finds that in the districts in which such incorrect listings were made, the true value of personal property used in manufacturing and used other than in manufacturing for such year, including boats and barges, is set forth as to amounts in the districts in the schedule below:

		Amended True Values
Used In Manufacturing		
Allen County	—Shawnee Twp. Shawnee RSD	$778,163
Cuyahoga County	—Cleveland	10,960,267
Lucas County	—Oregon Twp.	3,226,760
Used Other Than In Manufacturing		
Cuyahoga County	—Cleveland	1,354,493
Portage County	—Randolph Twp.	5,701
	—Suffield Twp.	44,883
Summit County	—Franklin Twp. E. Sch.	14,301
	—Franklin Twp. W. Sch.	43,859
	—Green Twp.	31,478
	—Springfield Twp.	14,169
Wayne County	—Chippewa Twp.	16,618
Hancock County	—Washington Twp. Arcadia R. S. D.	49,013
Cuyahoga County	—Cleveland	670,989
	—Brecksville	5,803
	—Euclid	11,049
	—Chagrin Falls	5,607
Defiance County	—Defiance	3,040
	—Hicksville	3,792
Fairfield County	—Lancaster	7,711
Franklin County	—Columbus	112,936
Fulton County	—Wauseon	3,003
	—Fayette	2,722
Geauga County	—Chardon	3,307

Hamilton County	—Cincinnati	239,683
Henry County	—Napoleon	3,839
Jefferson County	—Steubenville	15,477
Lake County	—Painesville	8,118
Lawrence County	—Ironton	6,732
Lucas County	—Maumee	6,273
	—Toledo	161,704
Ross County	—Chillicothe	8,715
Scioto County	—Portsmouth	64,413
Summit County	—Akron	114,858
Williams County	—Bryan	4,381
Wood County	—Grand Rapids	4,666

The Tax Commissioner further finds that in all other respects the assessment as heretofore made is correct and it is ordered that final assessment certificates issue reflecting the above findings.

DEPARTMENT OF TAXATION,
(Sgd.) C. EMORY GLANDER,
Tax Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the Department of Taxation this day taken by the Tax Commissioner with respect to the above matter.

(Sgd.) C. EMORY GLANDER,
Tax Commissioner.

In the Supreme Court of the United States

No. 184

THE STANDARD OIL COMPANY,
an Ohio Corporation,
Appellant,

vs.

C. EMORY GLANDER,
Tax Commissioner of Ohio, and
JOHN A. ZANGERLE,
Auditor of Cuyahoga County, Ohio,
Appellees,

JOHN W. PECK,
Tax Commissioner of Ohio, and
JOHN J. CARNEY,
Auditor of Cuyahoga County,
Substituted Appellees.

BRIEF OF APPELLANT OPPOSING APPELLEES' STATEMENT AND MOTION TO DISMISS OR AFFIRM.

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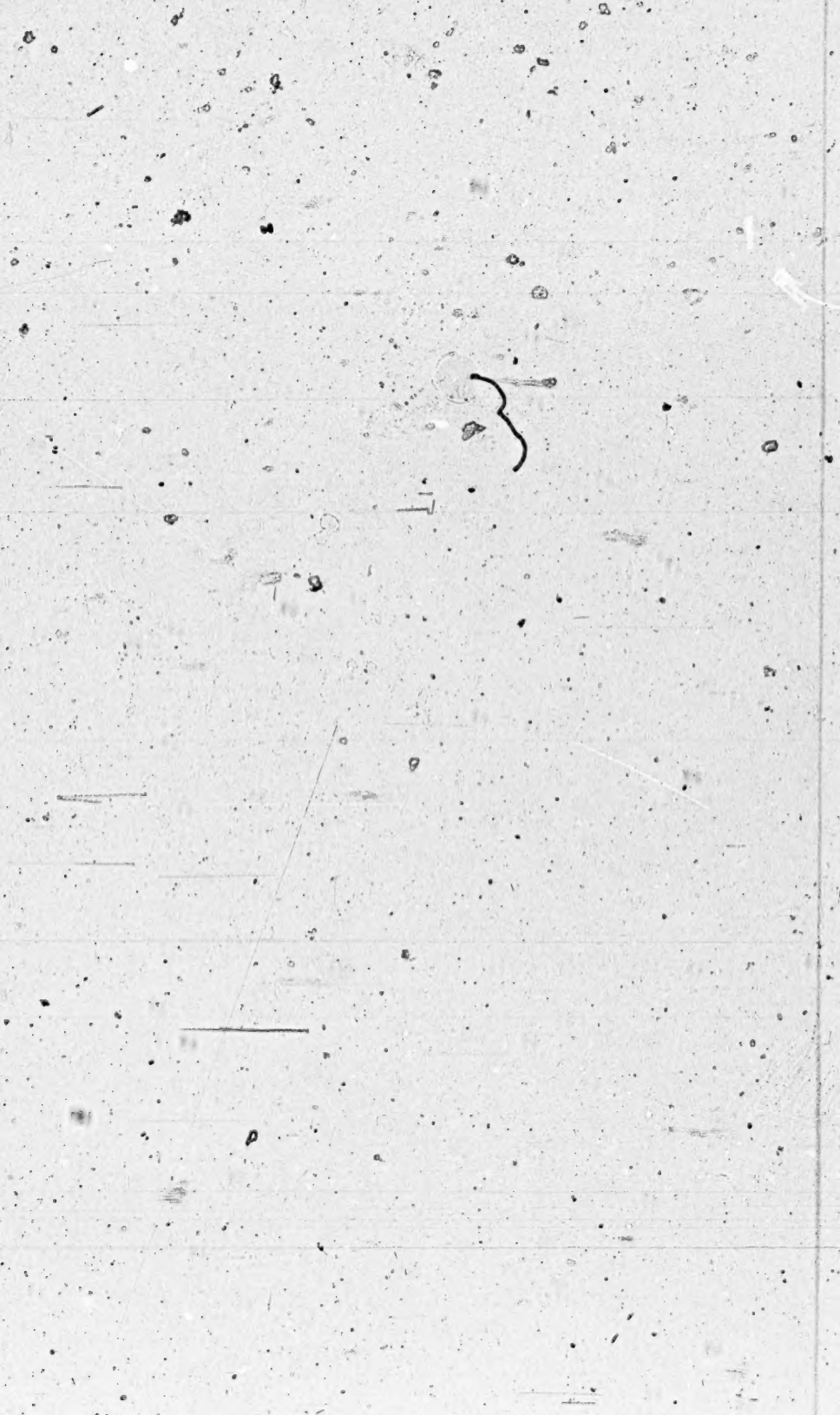

TABLE OF CASES.

Ayer & Lord v. Kentucky, 202 U. S. 409 (1905) 3

Hays v. The Pacific Mail Steamship Company, 17 How. 596 (1855) 1

Morgan v. Parham, 16 Wall. 471 4

Northwest Air Lines, Inc. v. Minnesota, 322 U. S. 292 (1944) 2, 3

Old Dominion S. S. Co. v. Virginia, 198 U. S. 299 (1905) 2

Ott v. Mississippi Valley Barge Company, 336 U. S. 169 (1949) 2, 3, 4

Southern Pacific Co. v. Kentucky, 222 U. S. 63 (1911) 3

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 (1905) 2, 4

In the Supreme Court of the United States

No. .....

THE STANDARD OIL COMPANY,
an Ohio Corporation,
Appellant,

vs.

C. EMORY GLANDER,
Tax Commissioner of Ohio, and
JOHN A. ZANGERLE,
Auditor of Cuyahoga County, Ohio,
Appellees,

JOHN W. PECK,
Tax Commissioner of Ohio, and
JOHN J. CARNEY,
Auditor of Cuyahoga County,
Substituted Appellees.

BRIEF OF APPELLANT OPPOSING APPELLEES' STATEMENT AND MOTION TO DISMISS OR AFFIRM.

In reply to appellees' contention that no substantial Federal question is presented by this appeal, we respectfully submit the following:

1. Appellees argue that the decisions of this Court establish that the state of domicile of the owner has jurisdiction to tax the full value of boats, unless the boats are used exclusively within a single other state.

While the decisions cited by appellees do so hold, appellees fail to mention the fact that at the time when these decisions were rendered, this Court also held that the jurisdiction of the state of domicile to tax such boats was exclusive. See *Hays v. The Pacific Mail Steamship Company,*

17 How. 596 (1855), and other cases cited by appellees. At that time, this Court also held that if a boat was used exclusively within a single other state, the jurisdiction of that state to tax was exclusive (*Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299 (1905); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194 (1905)). Both of these holdings resulted in a boat being subject to one tax on its full value, but no more.

This Court has now decided in *Ott v. Mississippi Valley Barge Company*, 336 U. S. 169 (1949), that river boats which are used regularly in a number of states other than the domicile of their owner, may be taxed by each of these states on an apportioned basis.

The question presented by the instant case is whether, in view of the *Ott* decision, the state of domicile of the owner *still* has jurisdiction to tax the full value of such boats. If it does have such jurisdiction, then, as indicated by the Ohio Supreme Court, boats may be subject to a total of two taxes on their full value, instead of one. We submit that whether this result is consistent with due process is a most substantial Federal question, not yet answered by this Court.

2. Appellees rely on the decision of this Court in *Northwest Air Lines, Inc. v. Minnesota*, 322 U. S. 292 (1944). However, they lose sight of the fact that, in the very part of the opinion of Mr. Justice Frankfurter in that case which they quote, the learned Justice points out that it was not shown "that a defined part of the domiciliary corpus has acquired a permanent location, i.e. a taxing situs, elsewhere."

While this was true in the *Northwest* case, it is not true in the instant case. In the instant case, unlike the *Northwest* case, the record *does* show that the boats of appellant have acquired a taxing situs on an apportioned basis in each of the river states in which they are regularly used. The record shows clearly and explicitly the regular use of

appellant's boats on the waters of other states, the exact routes traveled through these states, and the mileages and barrel-mileages involved in each route. We submit that the record in this regard is indistinguishable from the record in the *Ott* case, which was expressly held by this Court to establish a taxing situs in the various non-domiciliary states in which the boats there involved were used.

The question is therefore squarely presented in the instant case whether tangible property which has acquired, at least on an apportioned basis, a "taxing situs elsewhere", may still be taxed on a full value basis in the state of domicile of the owner.

3. Appellees seek to distinguish the instant case from the *Ott* case, and to assimilate it to the *Northwest* case, by arguing that the "home port" of appellant's boats was in Ohio, and that these boats were not outside Ohio throughout the year.

So far as concerns the "home port" argument, the facts that led this Court to conclude in the *Northwest* case that Minnesota, the state of domicile, was "the home state of the fleet, as a business fact," are not present here. None of the barrel-mileage of the boats is in Ohio, they never load or unload cargo in an Ohio port, and they are never drydocked or put in for major repairs in Ohio, but only at down-river points. While it is true that the boats are registered from Cincinnati, the record shows that this has no particular significance and that the boats could equally well have been registered from any point (R. I, 79). Registry is a formality required by federal law which has some significance under the Federal Navigation and Ship Mortgage Laws (46 U. S. C. 17 and 18), but has no significance under any state law. Moreover, this Court has repeatedly held that the port of registry has no controlling significance with respect to jurisdiction to tax (*Ayer & Lord v. Kentucky*, 202 U. S. 409 (1905); *Southern Pacific Co. v. Kentucky*, 222 U. S. 63, 68 (1911)).

With regard to appellees' argument that the boats are not outside Ohio throughout the year, there is no question that, as above stated, all the transportation of cargo by the boats occurs outside Ohio, and that they never load or unload cargo in an Ohio port. The only time when any of the boats even arguably enters Ohio is on those sporadic occasions when it puts into Cincinnati, as it might to any other river port, for food or minor repairs.

Even if the .7 of 1% of the mileage, or the 1.27% of the barrel-mileage, through waters of the Ohio River bordering on Ohio, which waters are actually part of Kentucky, were viewed as being within Ohio, this would not make the boats taxable in Ohio, except perhaps to the extent of .7 of 1% or 1.27%. This is shown by the case of *Union Refrigerator Transit Co. v. Kentucky, ante*, set forth in our Jurisdictional Statement, which holds that the state of domicile of a railroad car company, in which state an average of only one to three percent of the cars were used during the year, violated the due process clause when it attempted to tax the full value of the fleet. Since, under the *Ott* case, the same rule governing the taxation of rolling stock also applies to river boats, the *Union Refrigerator Transit* case is here exactly in point.

4. Appellees stress the fact that none of the river states has yet assessed appellant's boats and barges for the years in question. Apart from the fact that the State of Kentucky has asserted the right to tax the boats on an apportioned basis, and that the statutes of Kentucky and some of the other river states provide for such a tax, it is clear that jurisdiction of one stae to tax property does not depend on whether some other state has in fact taxed the same property. As this Court stated in *Morgan v. Parham*, 16 Wall. 471, 478:

> "Whether the Steamer Frances was actually taxed in New York during the years 1866 and 1867 is not shown by the case. It is not important. She was liable to taxation there."

We accordingly submit that the Federal question involved in the instant case is a very substantial and important one, and that the Motion of Appellees to Dismiss or Affirm should be overruled.

Respectfully submitted,

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the Supreme Court of the United States

OCTOBER TERM, 1951.

No. 184.

THE STANDARD OIL COMPANY,
an Ohio Corporation,
Appellant,

vs.

JOHN W. PECK,
Tax Commissioner of Ohio, and
JOHN J. CARNEY,
Auditor of Cuyahoga County, Ohio,
Appellees.

APPEAL FROM
THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR THE APPELLANT.

ISADOR GROSSMAN,
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INDEX.

Opinions Below 1

Jurisdiction 1

Question Presented 2

Statutes Involved 3

Statement 4

Specification of Errors 8

Summary of Argument 9

Argument 12

1. Under the due process clause tangible personal property is not subject to multiple taxation ... 12

2. Vehicles of surface transportation, such as river boats and rolling stock, are taxable on an apportioned basis by each foreign state in which they are habitually used 14

3. To the extent that such vehicles of surface transportation are taxable on an apportioned basis by foreign states, they are outside the taxing jurisdiction of the state of domicile of their owner 18

4. The above rules apply even in the absence of proof that any individual boat, or any number of changing boats, was within a particular foreign state on each of 365 days of the year, so long as it is shown, as it is here, that the boats were used habitually in the particular foreign state, in the usual course of their operations, and for an ascertainable proportion of their use 22

5. The mere fact that some of Appellant's boats and barges sporadically docked at Cincinnati did not destroy the jurisdiction of the foreign states to tax them on an apportioned basis, or give the domiciliary state jurisdiction to tax them at full value 28

Conclusion 30

TABLE OF AUTHORITIES.

Cases.

American Refrigerator Transit Co. v. Hall, 174 U. S. 70 (1899) 11, 16, 23, 24, 27, 28

Ayer & Lord Co. v. Kentucky, 202 U. S. 409 (1906) 15

Baldwin v. Missouri, 281 U. S. 586 (1930) 13

Curry v. McCanless, 307 U. S. 357 (1939) 9, 13

Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930) 13

First National Bank v. Maine, 284 U. S. 312 (1932) 13

Handly's Lessee v. Anthony, 5 Wheat. 374 (1820) 5

Hays v. Pacific Mail S. S. Co., 17 How. 596 (1854) 14

Jeffersonville Ferry Co. v. Kentucky, 188 U. S. 385 (1903) 12

Johnson Oil Co. v. Oklahoma, 290 U. S. 158 (1933) 10, 11, 20, 21, 25, 26, 27, 28

Morgan v. Parham, 16 Wall. 471 (1872) 14

N. Y. Central Railroad v. Miller, 202 U. S. 584 (1906) 10, 19, 20, 22, 23, 26, 28

Northwest Airlines, Inc. v. Minnesota, 322 U. S. 292 (1944) 8, 10, 22, 23

Old Dominion S. S. Co. v. Virginia, 198 U. S. 299 (1905) 14

Ott v. Mississippi Valley Barge Line Co., 336 U. S. 169 (1949) ---- 7, 10, 16, 23, 24, 26, 27

Pullman's Car Co. v. Pennsylvania, 141 U. S. 18 (1891) ---- 15

Southern Pacific Co. v. Kentucky, 222 U. S. 63 (1911) ---- 12, 14

Union Transit Co. v. Kentucky, 199 U. S. 194 (1905) ---- 10, 11, 12, 18, 19, 20, 21, 23, 25, 27, 28

Statutes.

Ohio General Code:

Section 5325 ---- 2, 3, 7, 9, 30

Section 5328 ---- 2, 3, 7, 9, 30

28 U. S. C. 1257(2) ---- 2

46 U. S. C. 17, 18 ---- 6

Constitution.

Constitution of the United States:

Fourteenth Amendment ---- 2, 7, 9, 12, 19

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APPEAL FROM
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BRIEF FOR THE APPELLANT.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals of Ohio is not reported, but appears at page 13 of the printed record. The opinion of the Supreme Court of Ohio is reported at 155 O. S. 61, 98 N. E. 2d 8.

JURISDICTION.

The final judgment of the Supreme Court of Ohio in this case was rendered March 14, 1951, on which day the Supreme Court of Ohio delivered its opinion and entered its decision on its journal (R. 11). An Application for Appeal was presented to, and allowed by the Chief Justice of the Supreme Court of Ohio on June 7, 1951 (R. 2).

Probable jurisdiction of this Court was noted October 8, 1951. Such jurisdiction rests on 28 U. S. C. 1257(2), as there was drawn in question in this case by Appellant the validity of Sections 5328 and 5325 of the General Code of Ohio on the ground of their being repugnant to the Constitution of the United States, and the decision of the Supreme Court of Ohio was in favor of their validity.

QUESTION PRESENTED.

The Supreme Court of Ohio held that Section 5328 and 5325 of the Ohio General Code require the taxation in Ohio, at their full value, of river boats and barges, owned by an Ohio corporation, which:

(1) Were habitually operated through waters of other states, the proportion of use in each other state being readily ascertainable,

(2) Had no part of their route mileage in Ohio,

(3) Had only a little over 1% of their route mileage through waters which even bordered on Ohio, and

(4) Entered Ohio, if at all, only sporadically.

The Supreme Court of Ohio further held that these statutes, so construed, were not unconstitutional as a deprivation of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

The question presented by this Appeal is whether the holding of the Supreme Court of Ohio on this constitutional issue is erroneous.

STATUTES INVOLVED.

Sections 5328 and 5325 of the Ohio General Code read as follows:

"Sec. 5328. *Property to be entered on general tax list and duplicate.*—All real property in this state shall be subject to taxation, except only such as may be expressly exempted therefrom. All personal property located and used in business in this state and all domestic animals kept in this state, whether used in business or not shall be subject to taxation, regardless of the residence of the owners thereof. All ships, vessels and boats, and shares and interests therein, defined in this title as 'personal property,' belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, shall be subject to taxation. All property mentioned in this section shall be entered on the general tax list and duplicate of taxable property as prescribed in this title."

"Sec. 5325. *'Personal property' defined.*—The term 'personal property' as so used, includes every tangible thing being the subject of ownership, whether animate or inanimate, other than patterns, jigs, dies, drawings, money and motor vehicles registered by the owner thereof, and not forming part of a parcel of real property, as hereinbefore defined; also every share or portion, right or interest, either legal or equitable, in and to every ship, vessel, or boat, of whatsoever name or description, used or designed to be used either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere, and whether it has been enrolled, registered, or licensed at a collector's office, or within a collection district in this state, or not."

STATEMENT.

Appellant is an Ohio corporation engaged primarily in producing, transporting, refining and marketing petroleum and its products. Its principal sources of crude oil are located in the southern and southwestern portions of the United States, and its refineries are located in Ohio and Kentucky. During 1944 and 1945, the years involved in this case, Appellant owned crude oil boats and barges which it employed in transporting oil from points on the lower Mississippi and Ohio Rivers to such points as Mt. Vernon, Indiana, and Bromley, Kentucky (R. 66 *et seq.*).

The portions of the Mississippi and Ohio Rivers traversed by the Appellant's crude oil boats and barges during 1944 and 1945 are indicated in red on Appellant's Exhibit 1 (R. 102A, offered R. 72). The same exhibit shows in green the route traversed by Appellant's gasoline boats and barges which are not involved in this case.

The great bulk of the operation of Appellant's boats and barges during this period was on three regular routings: Memphis, Tennessee, to Mr. Vernon, Indiana; Memphis, Tennessee, to Bromley, Kentucky; and Baton Rouge or Gibson's Landing, Louisiana, to Bromley, Kentucky (R. 66, 102B)—Mt. Vernon, Indiana, and Bromley, Kentucky, being the two river terminals of Appellant (R. 66, 75, 76). The miles and "barrel miles" (number of miles multiplied by number of barrels of crude oil carried) traversed by each boat on each route during the period in question are shown on Appellant's Exhibit 2 (R. 102B, offered R. 79).

Of the total river mileage traversed by Appellant's boats and barges here involved on any of their trips up the Mississippi and Ohio Rivers, the maximum through waters bordering on Ohio was only 17½ miles. These

17½ miles were the 17½ miles of the Ohio River east of the Indiana-Ohio border, which the boats and barges had to traverse to get to Bromley, Kentucky, which is across the Ohio River from Cincinnati (R. 73, 74). Even these 17½ miles were not within the State of Ohio, since the southern border of Ohio is low water mark on the Ohio side of the river. (*Handly's Lessee vs. Anthony*, 5 Wheat. 374 (1820).) At no time during 1944 or 1945 did any of the crude oil boats and barges owned by Appellant on January 1, 1945, or January 1, 1946,* proceed farther east than Bromley, Kentucky. While one trip was made to Catlettsburg, Kentucky, east of Bromley, in 1944, this trip was made by a boat which was sold during 1944 and is not here involved (R. 77).

Perhaps the best measure of the activity of Appellant's crude oil boats and barges in various waters on various portions of their route is the percentage of "barrel miles" attributable to such portions of the route. Using this measurement, Appellant's Exhibit 2 (R. 102B, offered R. 79) shows that the percentage of barrel miles operated by Appellant's various boats in the portion of the river bordering on Ohio in 1944 and 1945 ranged from less than 1% to less than 2%, the average of all boats for the two years being 1.26%. The same exhibit shows that, if a "mileage," rather than a "barrel mileage" basis was used, only .7 of 1% was in the portion of the river bordering on Ohio. Of course, as already explained, none of these barrel miles were actually within Ohio. As stated by Mr. Pattison, who prepared Appellant's Exhibit 2, the term "Ohio waters" used in such exhibit means merely the

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* Ohio personal property tax assessments are made as of the first of each year on the basis of the facts existing in the prior year.

portion of the Ohio River bordering on Ohio, not waters actually within Ohio (R. 74).

While Appellant's crude oil boats and barges are registered from Cincinnati (R. 79), Mr. Pattison testified that this had no particular significance and that the boats could equally well have been registered from any point (R. 80). As a matter of fact, registry is a formality required by Federal law, which has some significance under the Federal Navigation and Ship Mortgage laws (See 46 U. S. C. 17, 18), but has no significance under any Ohio law.

All major repairs of the boats and barges were made at Paducah, Kentucky, St. Louis, Missouri, or some other down-river point, and they were drydocked at these points (R. 79, 80). The only time any of the boats or barges ever docked at an Ohio port during the years in question was when a boat, after discharging its cargo at Bromley, Kentucky, occasionally stopped at Cincinnati for a couple of hours for food, fuel or minor repairs, just as it frequently did at other points farther south on the river. No cargo was ever unloaded or taken on at Cincinnati during the years in question, as the boats and barges always went back down the river empty (R. 84).

Even when a boat docked at Cincinnati on one of its occasional stops, it was almost certainly still not within the State of Ohio because, as we have seen, the State of Kentucky extends all the way to low water mark on the Ohio side of the river, and, presumably, a boat would not be docked where it would be grounded.

The Tax Commissioner of Ohio included Appellant's boats and barges in its Ohio personal property tax assessment for 1945 at a value of $1,322,863.00, and in its assessment for 1946 at a value of $1,303,907.00. Appellant did

not question these valuations but contended in its Appeal to the Board of Tax Appeals of Ohio, first, that Sections 5328 and 5325 of the Ohio General Code did not require the taxation of Appellant's boats and barges, because they were not used in Ohio, and their use in waters bordering on Ohio was insubstantial, and, second, that if these statutes did so require, they were violative of the due process clause of the Fourteenth Amendment of the United States Constitution (R. 58).

After hearing the evidence in the case, the Board of Tax Appeals affirmed the Tax Commissioner's assessment by a two to one vote, the majority holding that the statutes did require the taxation of the boats and barges, and that the Board, not being a court, had no authority to pass on the constitutionality of the statutes (R. 13, 18). The third member of the Board dissented on the ground that Appellant's river boats and barges were not "within Ohio," and therefore could not constitutionally be taxed by Ohio (R. 39).

From the decision of the Board of Tax Appeals, Appellant appealed to the Supreme Court of Ohio. The Supreme Court of Ohio first affirmed the Board's decision that Sections 5328 and 5325 required the taxation of the boats and barges. It then proceeded to consider on the merits the question whether these statutes, so construed, were repugnant to the due process clause, and held that they were not. This holding is evidenced by the Supreme Court of Ohio's judgment (R. 11), its opinion (R. 103), and its certificate of intent (R. 123).

In reaching this conclusion, the court accepted the facts as above set forth, and conceded that, under the decision of this Court in *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169 (1949), Appellant's boats and barges

were probably taxable on an apportioned basis by all the states on the Ohio and Mississippi Rivers through whose waters they regularly navigated. In spite of this, the court concluded that, under the case of *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292 (1944), which was mentioned but not modified in the *Ott* case, the statutes of Ohio, Appellant's domicile, taxing the entire value of Appellant's boats and barges, were valid. With reference to the contention of Appellant that, if the foreign states could tax the boats and barges on an apportioned basis and Ohio could at the same time tax their entire value, the boats and barges would bear a multiple tax burden, the Supreme Court of Ohio stated:

> "The Supreme Court of the United States [in the *Ott* case] applied the rule to the taxation of tangible property which it had theretofore applied to the taxation of intangible personal property, that is, that such property may be taxed both at its domiciliary situs and at the place where it had acquired a business situs."

This is an appeal from the above decision of the Supreme Court of Ohio.

SPECIFICATION OF ERRORS.

The assigned errors which Appellant intends to urge are that the Supreme Court of Ohio erred in the following respects:

1. In holding that Ohio, the domiciliary state of Appellant, on the facts disclosed by the record, had jurisdiction to tax Appellant's boats and barges, at their full value and without apportionment, for Ohio Personal Property Tax purposes for the years 1945 and 1946, although these boats and barges were used solely and habitually in navigating the Mississippi and Ohio Rivers from points in

Louisiana or Tennessee to points in Indiana or Kentucky, all their route-mileage was outside of Ohio, only 1.27% of such route-mileage was in waters which bordered on Ohio, and the boats and barges entered Ohio, if at all, only rarely and sporadically; and

2. In failing to hold that Sections 5328 and 5325 of the General Code of Ohio, which it construed to require the taxation of Appellant's boats and barges, at their full value and without apportionment, for Ohio Personal Property Tax purposes for 1945 and 1946, were violative of and repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States (R. 3).

SUMMARY OF ARGUMENT.

Under the due process clause, tangible property is not subject to multiple taxation. The state of domicile of the owner can tax tangible property which has not acquired a situs elsewhere as, for instance, ocean-going vessels, which would otherwise escape taxation entirely. However, tangible property which has acquired a situs elsewhere, i.e., in a foreign state, can be taxed only by such foreign state. This rule granting exclusive taxing power to the foreign state is based on the special benefits and protection given to the tangible property by the foreign state where it is actually located, and has been reaffirmed by this Court many times—even in those cases, such as *Curry v. McCanless*, 307 U. S. 357, which have held that the rule does not extend to intangibles.

This rule has been applied by this Court to vehicles of surface transportation which habitually operate in more than one state. Thus, on the one hand, this Court has consistently held that, where rolling stock is habitually used

within one or more foreign states, each such foreign state has jurisdiction to tax the same on an apportioned basis reflective of the average number of cars used within its borders, and has also held that the same rule of apportionment applicable to rolling stock is applicable to river boats (*Ott v. Mississippi Barge Line*, 336 U. S. 169). On the other hand, the Court has held that, to the extent rolling stock or river boats acquire a situs in one or more foreign states so as to be taxable on an apportioned basis by such states, the jurisdiction of the domiciliary state to tax them is correspondingly diminished. This was specifically held by this Court in *Union Transit Co. v. Kentucky*, 199 U. S. 194, and reaffirmed in *Johnson Oil Co. v. Oklahoma*, 290 U. S. 158, on the principle that tangible property is protected from multiple taxation. While both these cases relate to rolling stock, they are fully applicable to the instant case, in view of the holding in the *Ott* case (wherein the facts are almost identical with those in the instant case) that the rule of apportionment applies to river boats in the same manner as it does to rolling stock.

While there is language in *New York Central R. R. v. Miller*, 202 U. S. 584, and *Northwest Airlines v. Minnesota*, 322 U. S. 292, indicating that a foreign state does not acquire jurisdiction to tax cars or boats used habitually within its borders, and that the domiciliary state does not correspondingly lose jurisdiction to tax the full value thereof, unless one or more cars or boats were within the foreign state permanently and continuously throughout the tax year; such language was not necessary to the decision of either of these case. Such a limitation on the rule of apportionment would, moreover, not be reasonable, since a foreign state which has given benefits and protection during most of a tax year should not be totally deprived of jurisdiction to tax, nor should the domiciliary

state be given the right to tax full value, just because there were a few days during the tax year when there were no cars or boats in the foreign state. That no such limitation exists is, moreover, shown by *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, *Union Transit Co. v. Kentucky*, 199 U. S. 194, and *Johnson Oil Co. v. Oklahoma*, 290 U. S. 158, in all of which cases the rule of apportionment was applied even though it was not shown that any cars were in the foreign state on every day of the tax year.

These cases and the above reasoning also show the unsoundness of the view expressed in the *Miller* case to the effect that the rule of apportionment, even if otherwise applicable, is defeated if cars or boats are used within the domiciliary state for any portion of the tax year. However, even if this view were sound, it would be inapplicable to the instant case and the rule of apportionment would apply thereto, because Appellant's boats and barges entered Ohio only rarely and sporadically, if they entered it at all.

Accordingly, as Appellant's boats and barges were used exclusively in transporting crude oil from points on the lower Mississippi to points on the Ohio River; as their route-mileage on each routing is clearly shown and their route-mileage within each state is readily calculable; as no part of their route-mileage was within Ohio; as they never took on or delivered cargo in Ohio and were never dry-docked or given major repairs there; as the only time they docked at an Ohio port was on those sporadic occasions when they put in to Cincinnati, as they might to any other port, for food and minor repairs; and as even then, they were in Ohio only if they docked above low-water mark; these boats and barges were taxable on an apportioned basis by the various foreign states through which they operated, but, because of the due process clause, they were not taxable in Ohio.

ARGUMENT.

1. Under the due process clause tangible personal property is not subject to multiple taxation.

This Court has held consistently that under the due process clause of the Fourteenth Amendment, real estate and tangible personal property are not subject to multiple taxation.

Where tangible property has no definite situs, so that, if the state of domicile of the owner is not permitted to tax, the property will be free from taxation anywhere, this Court has held it consistent with due process for the domicile to tax the full value of the property, even though it never comes within the territorial limits of the state. *Southern Pacific Co. v. Kentucky*, 222 U. S. 63 (1911).

But where tangible property has a definite situs in a foreign state, this Court has always held that such foreign state has jurisdiction to tax, and that taxation by the state of domicile of the owner is a denial of due process. *Jeffersonville Ferry Co. v. Kentucky*, 188 U. S. 385, 396 (1903); *Union Transit Co. v. Kentucky*, 199 U. S. 194 (1905).

The basis of such holding has been that, while other states, such as the state of the domicile of the owner, might have some conceivable relation to the enjoyment of land or chattels located in another state, the benefits and protection conferred by the state where such property is actually situated are so much greater than are conferred by any other state that it is contrary to fundamental justice to allow any other state to tax it. In holding that this rule, already long established as to real estate, applied equally to tangible personal property, this Court stated in *Union Transit Co. v. Kentucky*, 199 U. S. 194, 204:

> "The argument against the taxability of land within the jurisdiction of another state applies with equal

> cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing state, but does not and cannot receive protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction."

At one time, and for a short period, this Court held that intangible property, as well as tangible property, was free under the due process clause from multiple taxation. *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204 (1930); *Baldwin v. Missouri*, 281 U. S. 586 (1930); *First National Bank v. Maine*, 284 U. S. 312 (1932).

This Court later overruled these decisions, and returned to its earlier viewpoint that, since intangibles were "but relationships between persons * * * which the law recognizes by attaching to them certain sanctions enforceable in courts," such property could be subjected to multiple taxation without violating the due process clause. *Curry v. McCanless*, 307 U. S. 357, 366 (1939). However, in reaching this conclusion with respect to intangibles, the Court reaffirmed the rule that tangible property is not subject to multiple taxation, stating at page 363:

> "That rights in tangibles—land and chattels—are to be regarded in many respects as localized at the place where the tangible itself is located for purposes of the jurisdiction of a court to make disposition of putative rights in them, for purposes of conflict of laws, and for purposes of taxation, is a doctrine generally accepted both in the common law and other legal systems before the adoption of the Fourteenth Amendment and since."

The differences between intangibles and tangibles, so far as the protection and benefits derived from governments are concerned, may in one sense be differences of

degree. However, the protection and benefits which a piece of real estate or a chattel derives from the State in which it is actually located are so much greater than intangible property, or its owner, derives from any particular state that, like many other differences in degree, it amounts to a difference in kind. As we have seen, this Court has consistently supported this view, and has consistently held tangible property constitutionally free from multiple taxation.

We shall now consider the manner in which this principle has been applied to vehicles of surface transportation which are used in more than one state.

2. Vehicles of surface transportation, such as river boats and rolling stock, are taxable on an apportioned basis by each foreign state in which they are habitually used.

The earliest cases involving jurisdiction to tax vehicles of surface transportation related to ocean-going vessels, which spent most of their time on the high seas and had no definite situs in any state. Realizing that if such vessels could not be taxed by the state of domicile of the owner, they would probably escape taxation everywhere, this Court held that the state of domicile of the owner had jurisdiction to tax them, and that its jurisdiction was exclusive. *Hays v. Pacific Mail S. S. Co.*, 17 How. 596 (1854); *Morgan v. Parham*, 16 Wall. 471 (1872); *Southern Pacific Co. v. Kentucky*, 222 U. S. 63 (1911).

Where, however, an ocean-going tug was used solely on the waters of a single foreign state, this Court had no hesitation in holding that such foreign state had jurisdiction to tax, and indicated that this jurisdiction was exclusive. *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299 (1905).

In *Ayer & Lord Co. v. Kentucky*, 202 U. S. 409 (1906), the Court denied the right of Kentucky to tax boats owned by an Illinois corporation and used in navigating the Mississippi River and its tributaries within the boundaries of various states. However, Kentucky made no attempt in this case to show that the boats were used habitually in Kentucky waters for any ascertainable portion of the time, but rested its claim solely on the fact that the boats were enrolled at Paducah, Kentucky—a fact which this Court held to be without significance, as an owner under Federal law had an arbitrary discretion as to where to register his boat, and registration in a particular state did not indicate that such state was conferring any benefits or protection on the boat.

During the period covered by these decisions on the taxation of watercraft, this Court was also called on to decide cases involving the taxability of rolling stock. In these cases this Court held that, where a fleet of railroad cars was used habitually in foreign states, all such foreign states had jurisdiction to tax a fairly apportioned part of the value of the entire fleet of cars, leaving the state of domicile of the owner free to tax only such part as had not acquired a situs in any other state.

One of the first cases on this point was *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18 (1891). In that case the Pullman Company, an Illinois corporation, had at all times during the tax years in question about 100 coaches and cars in Pennsylvania, although these cars were not always the same cars. This Court held that Pennsylvania had the constitutional right to tax such proportion of the total value of the Pullman Company's capital stock as the number of miles of track over which it ran cars in Pennsylvania bore to the total number of miles of track in all states.

The case of *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70 (1899), was similar, except that it was not shown either that the identical cars were used in the foreign state (Colorado) throughout the tax year, or even that there were some cars within such foreign state at all times during the tax year. The stipulation of fact on which the case was tried showed that the taxpayer's cars "never were run in said State in fixed numbers nor at regular times, nor as a regular part of particular trains," and that they were "only transiently present in said State"; but "that the average number of cars * * * within the State of Colorado during the year for which such assessment was made would equal 40." On these facts this Court held that Colorado, although not the domicile of the owner, had jurisdiction to make a tax assessment against the company based on the value ascribed to 40 cars. Mr. Justice Shiras stated at page 82:

> "We think that such a tax may be properly assessed and collected, in cases like the present where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed."

The question, whether the rule permitting rolling stock to be taxed on an apportioned basis by each foreign state in which it is habitually used also applies to river boats, was first presented to this Court in the recent case of *Ott v. Mississippi Barge Line*, 336 U. S. 169 (1949). The facts in that case were almost identical with those in the instant case. The boats and barges there involved were owned by several Delaware corporations, all of whose cases were tried together. These boats were used in trans-

porting freight up and down the Mississippi and Ohio Rivers. They were not registered at any Louisiana port and were not operated on a fixed schedule in Louisiana or anywhere else, but from 2 to 17% of the total number of miles which the boats of the various companies traveled were within Louisiana waters. The boats docked at Louisiana ports for such comparatively short periods of time as were required to discharge and take on cargo and make temporary repairs. On these facts Louisiana assessed taxes against the companies "based on the ratio between the total number of miles of appellees' lines in Louisiana and the total number of miles of the entire line." The companies contended that, under the rule previously established as to ocean-going vessels, no part of the value of their boats and barges was taxable by Louisiana, but that the entire value thereof was within the exclusive taxing jurisdiction of the state of domicile of the owner. This contention was sustained by the District Court and by the Circuit Court of Appeals, both of which ruled against Louisiana's right to tax.

This Court, however, reversed the decision of the lower courts and ruled in favor of Louisiana. In so ruling, it held that river boats, which, unlike ocean-going boats but like rolling stock, were at all times within the limit of some state, should be taxed under the rule of apportionment, in exactly the same manner as rolling stock. Mr. Justice Douglas stated as follows at page 174:

> "We see no practical difference so far as either the Due Process Clause or the Commerce Clause is concerned whether it is vessels or railroad cars that are moving in interstate commerce. The problem under the Commerce Clause is to determine 'What portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.'

Nashville, C. & St. L. R. Co. v. Browning, 310 U. S. 362, 365, 60 S. Ct. 968, 970, 84 L. Ed. 1254. So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. See *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444, 61 S. Ct. 246, 249, 85 L. Ed. 267, 130 A. L. R. 1229. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State.

"* * * We can see no reason which should put water transportation on a different constitutional footing than other interstate enterprises."

It is thus the established rule of this Court that river boats as well as rolling stock are taxable on an apportioned basis by each foreign state in which they are habitually used.

3. To the extent that such vehicles of surface transportation are taxable on an apportioned basis by foreign states, they are outside the taxing jurisdiction of the state of domicile of their owner.

Under the doctrine consistently followed by this Court that tangible property is not subject to multiple taxation, it follows that, to the extent that a foreign state has jurisdiction to tax tangibles on an apportioned basis, these are not subject to taxation by the domiciliary state.

This was the express holding of this Court in *Union Transit Co. v. Kentucky*, 199 U. S. 194 (1905). In that case the company was incorporated in Kentucky and owned a fleet of cars which it rented to shippers who used them all over the United States. While there was no showing that any of the cars were outside Kentucky during the entire year, it was shown that the average number of

cars used in Kentucky during the years in question ranged from 28 to 67, out of a total of 2,000 cars. In spite of the fact that only 1 to 3% of the use of the cars was within its borders, Kentucky, on the ground that it was the domicile of the owner, attempted to tax the entire value of the fleet. The company contended that such taxation would result in a deprivation of its property without due process of law, in violation of the Fourteenth Amendment. This Court, after a careful review of the authorities relating to the taxation of tangibles, sustained the company's contention, stating at page 211:

> "We are of opinion that the cars in question, so far as they were located and employed in other states than Kentucky, were not subject to the taxing power of that commonwealth."

In the case of *N. Y. Central Railroad v. Miller*, 202 U. S. 584 (1906), the Supreme Court recognized the rule of the *Union Transit* case, but held that it did not apply where all the company's cars were used inside the domiciliary state for some proportion of the year, and their use outside the state was so irregular that they acquired no situs for tax purposes in any other state. In distinguishing the *Union Transit* and similar cases, the Court stated at page 597:

> "In the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other State as to be taxable there. The absences relied on were not in the course of travel upon fixed routes but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads."

In other words, the *Miller* case presented another situation in which denial to the state of domicile of the

right to tax the full value of the fleet of cars would have resulted in a part of the fleet escaping taxation entirely, as no other state would have had jurisdiction to tax any part not taxed by the domicile.

The rule of the *Union Transit* case was reiterated by this Court, subsequent to the decision of the *Miller* case, in *Johnson Oil Co. v. Oklahoma,* 290 U. S. 158 (1933). In that case the Company, an Illinois corporation, owned a fleet of tank cars, which were infrequently used at an oil plant which it owned in Illinois. The principal use of the cars was in transporting petroleum products from the company's refinery in Oklahoma to points in other states, and returning to the refinery in Oklahoma to be reloaded. Each car was outside the State of Oklahoma from 20 to 29 days out of each month. Most of the repair work on the cars was done at the Oklahoma refinery. Although the daily average number of cars in Oklahoma during the tax years in question was only between 37 and 66 cars out of a total of about 380 cars, Oklahoma attempted to tax the entire value of the fleet, on the theory that all the cars had acquired a taxable situs there. The company resisted this assessment on the ground that it would deprive it of property without due process of law in violation of the Fourteenth Amendment.

This Court unanimously sustained the company's contention and held that Oklahoma could tax only the daily average number of cars within Oklahoma. Mr. Chief Justice Hughes stated at page 161:

> "Appellant had its domicile in Illinois, and that State had jurisdiction to tax appellant's personal property which had not acquired an actual situs elsewhere. 'The State of origin remains the permanent situs of the property notwithstanding its occasional excursions to foreign parts.' See *New York Central & H. R. R. Co. v.*

Miller, 202 U. S. 584, 597; *Southern Pacific Co. v. Kentucky*, 222 U. S. 63, 69. *But the State of the domicile has no jurisdiction to tax personal property where its actual situs is in another State. Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 209, 211; *Western Union v. Kansas*, 216 U. S. 1, 38; *Frick v. Pennsylvania*, 268 U. S. 473, 489. While in this instance, it cannot be doubted that the cars in question had acquired an actual situs outside the State of Illinois, the mere fact that appellant had its refinery in Oklahoma would not necessarily fix the situs of the entire fleet of cars in that State. The jurisdiction of Oklahoma to tax the property of this description must be determined on a basis which is consistent with the like jurisdiction of other States."*

While the holding of the *Johnson* case was that Oklahoma, as a foreign state, could tax only a properly apportioned part of the fleet, the above language clearly reiterates the rule of the *Union Transit* case that, to the extent that part of the fleet acquires an actual situs for taxation elsewhere, the taxing jurisdiction of the domiciliary state is correspondingly diminished.

As already pointed out, this Court held in the *Ott* case that river boats are governed by the same rule as rolling stock, and that, where such boats are used habitually, rather than sporadically, in the waters of foreign states, such foreign states have jurisdiction to tax such boats on an apportioned basis reflective of the percentage of use within such states. In view of this, we submit that, under the *Union Transit* and *Johnson Oil* decisions, the domiciliary state retains jurisdiction to tax only such portion of the value of a fleet of river boats as has not so acquired a taxable situs in foreign states.

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* Emphasis is ours throughout this brief unless otherwise indicated.

4. The above rules apply even in the absence of proof that any individual boat, or any number of changing boats, was within a particular foreign state on each of 365 days of the year, so long as it is shown, as it is here, that the boats were used habitually in the particular foreign state, in the usual course of their operations, and for an ascertainable proportion of their use.

There is language in some of the decided cases indicating that a foreign state does not acquire taxing jurisdiction over rolling stock or river boats, and that the domiciliary state does not correspondingly lose jurisdiction to tax the full value thereof, unless either individual cars or boats, or at least some number of changing cars or boats, were within the foreign state permanently and continuously throughout the year—that is, on all 365 days of the year. The two cases particularly using such language are *N. Y. Central R. R. v. Miller*, 202 U. S. 584 (1906) and *Northwest Airlines v. Minnesota*, 322 U. S. 292 (1944).

However, in neither of these cases was this language necessary to the decision. In the *Miller* case, in which the jurisdiction of the domiciliary state to tax the full value of rolling stock was sustained, the largest part of the use thereof was in the domiciliary state, and it was not shown that the railroad cars there involved were used in any particular foreign state habitually or for an ascertainable proportion of their use. Thus, the Court stated at page 597 of its opinion:

> "The absences [from the state of domicile] relied on were not in the course of travel upon fixed routes but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads."

The *Northwest* case involved, not rolling stock or river boats, but aircraft, and there is an indication in some of the opinions given by the members of this Court that the taxation of aircraft is governed by the rule of exclusive domiciliary jurisdiction applicable to ocean-going vessels, rather than by the rule of apportionment which applies to rolling stock and river boats. Furthermore, considerable weight was given in the *Northwest* case to the fact that a substantial portion of the route ordinarily traversed by the planes, as well as their principal repair and maintenance bases, were located in the domiciliary state—which was not the fact either in the *American Refrigerator Transit* case, the *Union Transit* case, the *Ott* case, or in the instant case.

Apart from the fact that the *Miller* and *Northwest* cases are distinguishable from these cases, we do not believe that either reason or authority sustains the contention that cars and river boats are taxable by a foreign state and correspondingly free from taxation by the domiciliary state only when some cars or boats are within the particular foreign state on each of the 365 days of the tax year.

Certainly the foreign state does not acquire, or the domiciliary state correspondingly lose, taxing jurisdiction, unless the cars or boats are used in the foreign state habitually, in the usual course of their operations, for an ascertainable proportion of their use. However, if these conditions are fulfilled and one or more of the boats or cars is in the foreign state on each of, say, 360 days in the year, we submit that it would not be reasonable to defeat entirely the taxing jurisdiction of the foreign state, or to give the domiciliary state the right to tax the full value of the fleet, just because the trips were so arranged that on five

scattered days throughout the year none of the cars or boats happened to be within the foreign state.

Such a result would be contrary to the whole basis of the doctrine of apportionment. This Court has always indicated that jurisdiction to assess a property tax on cars or river boats depends on whether "the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing state" (*Ott v. Mississippi Barge Line*, 336 U. S. 169, 174). Certainly depriving a foreign state of all right to tax boats which have enjoyed its benefits and protection for 360 out of 365 days is not giving it taxing jurisdiction commensurate with the benefits or protection which it has afforded. Of course, if the number of days the boats are present in the foreign state is less than 365, this fact should be reflected in determining the average portion of the fleet taxable by the foreign state.

That the taxing jurisdiction of a foreign state in which cars or boats are habitually used, and the corresponding diminution in the jurisdiction of the domiciliary state, do not depend on at least one car or boat being within the foreign state on each of 365 days of the tax year is clearly evidenced by three of the cases which we have already discussed.

Thus, in *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70 (1899) the jurisdiction of Colorado, a foreign state, to tax rolling stock on an apportioned basis, was sustained *even though it was not shown either that the identical cars were used in Colorado throughout the year, or that there was at least one car in Colorado on each day of the year.* The only showing was that the average number of cars used in Colorado during the year was 40. In sustaining the right of Colorado to tax these 40 cars, this Court stated "that the tax may be fixed by an appraisement

and valuation of the *average amount* of the property thus *habitually* used and employed."

In the case of *Union Transit Co. v. Kentucky*, 199 U. S. 194 (1905), the domiciliary state had attempted to tax the entire value of a fleet of refrigerator cars, even though only one to three percent of the use of the cars was within the domiciliary state. *There was no evidence in the case either that one or more cars were in any particular foreign state on every day of the year, or even that any of the cars was out of the domiciliary state throughout the entire year.* The evidence was merely that the company rented out its cars to various railroad lines, that the cars were habitually used by the railroad lines in various states, and that the cars could be fairly apportioned among all the states, including the domiciliary state, by means of a formula. The formula used apportioned to Kentucky and to each foreign state such number of cars out of the entire fleet as the gross income of the company from car rentals attributable to each state bore to the company's entire gross income from car rentals everywhere. On the basis of this showing, this Court indicated that each foreign state could tax the number of cars allocable to it under the formula, and held that, under the due process clause, the domiciliary state could tax only the one to three percent of the cars which the formula allocated to it.

In *Johnson Oil Co. v. Oklahoma*, 290 U. S. 158 (1933) discussed on page 20 hereof, this Court held that Oklahoma, a foreign state, could tax an apportioned part, but could not tax the entire value, of a fleet of tank cars owned by an Illinois corporation and habitually used in transporting petroleum products from the corporation's refinery in Oklahoma to destinations in other states. *The evidence did not show, nor did the Court consider, whether one or more, or any average number, of the cars, was within Okla-*

homa on each day of the tax year. Mr. Chief Justice Hughes, speaking for a unanimous court, stated the rule as follows at page 162:

> *"The basis of the jurisdiction is the habitual employment of the property within the State.* By virtue of that employment the property should bear its fair share of the burdens of taxation to which other property within the State is subject. When a fleet of cars is habitually employed in several States—the individual cars constantly running in and out of each State—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in the other States. When individual items of rolling stock are not continuously the same but are constantly changing, as the nature of their use requires, this Court has held that a State may fix the tax by reference to the *average number of cars found to be habitually within its limits.*"

It is significant that the *Johnson Oil* case was decided after the *Miller* case. The principle laid down by the *Johnson Oil* case is that the jurisdiction of a foreign state to tax rolling stock, and the corresponding diminution of the right of the domiciliary state to tax the same, do not depend on the continuous presence of one or more cars in the foreign state on each day of the tax year, but merely on there being an average number of cars, whether changing or not, habitually within the foreign state in the tax year; also, that the tax assessed by each foreign state must be apportioned so as to reflect the extent of the use of the rolling stock therein. No case involving the taxation of rolling stock decided by this Court since the *Johnson Oil* case has in any way overruled or even called into question the principles laid down therein.

The principles applicable to the taxation of rolling stock were declared in *Ott v. Mississippi Barge Line,* 336

U. S. 169 (1949) to apply also to river boats. The facts as stated by this Court in the *Ott* case give no indication that there were one or more boats in Louisiana on each day of the tax year. However, as the Attorney General of Louisiana conceded that the statute there involved—unlike the Ohio statutes in question here—applied only where there was an average number of boats in Louisiana "throughout the taxing year," this Court decided the case on such assumption. It therefore did not have to consider whether Louisiana's taxing jurisdiction would have been lost if there had been one or more days during the tax year when no boats were in Louisiana. We submit that, if this Court had considered such question, it would have answered it in the negative in view of the principles enunciated in the *American Refrigerator Transit*, *Union Transit*, and *Johnson Oil* cases.

These principles are equally applicable to the instant case. The boats and barges of Appellant were used habitually, indeed exclusively, in transporting crude oil from points of origin on the lower Mississippi to destinations on the Ohio River. The great bulk of this use was on three routings—Memphis, Tennessee to Mt. Vernon, Indiana; Memphis, Tennessee to Bromley, Kentucky; and Baton Rouge or Gibson's Landing, Louisiana, to Bromley, Kentucky (R. 66). Appellant's Exhibit 2 (R. 102B offered R. 79) shows the exact mileages and barrel mileages on each routing, and the precise mileage or barrel mileage in each foreign state is readily calculable. No part of the route mileage of the boats and barges was within the domiciliary state, nor were they ever drydocked or given major repairs there (R. 79, 80). It follows that, under the rule laid down by this Court in the cases above cited, Appellant's boats and barges were taxable on an apportioned basis by each of the foreign states in which they were used, and no part of them was taxable in Ohio.

5. The mere fact that some of Appellant's boats and barges sporadically docked at Cincinnati did not destroy the jurisdiction of the foreign states to tax them on an apportioned basis, or give the domiciliary state jurisdiction to tax them at full value.

The *Miller* case, in addition to containing language indicating that a foreign state has jurisdiction to tax cars or boats on an apportioned basis only if there are some cars or boats in the foreign state on every day of the year, also contains language indicating that the domiciliary state has sole jurisdiction to tax any car or boat which enters it at any time during the tax year, even though most of the habitual use of the car or boat was in foreign states.

The discussion under 4. above adequately shows the lack of basis for this view. If a fleet of cars or boats is habitually used in a foreign state for an ascertainable portion of its use, and enjoys the protection of the foreign state during such use, there is no reason why the foreign state should be deprived of the right to assess a commensurate tax, or the domiciliary state given exclusive jurisdiction to tax, just because at some time during the year the cars or boats enter the domiciliary state.

This is, moreover, fully shown by the cases cited in 4. above. Thus, in the *American Refrigerator* case Colorado, a foreign state, was allowed as a result of apportionment to tax 40 of a fleet of cars, although there was no showing that any of the company's fleet was absent from the domiciliary state during the entire tax year. On the other hand, in the *Union Transit* case, Kentucky, the domiciliary state, was not allowed to tax more than 1 to 3% of the cars, although there was no showing that the 97 or 99% which Kentucky was not allowed to tax because they were habitually used in other states, never entered Kentucky during the tax year. Finally, in the *Johnson Oil*

case, Oklahoma, in common with other foreign states, was allowed to tax cars on an apportioned basis, even though it was affirmatively shown that the company's cars were occasionally used at an oil plant owned by the company in the domiciliary state (290 U. S. 158, 160).

As a matter of fact, even if the rule of apportionment did not apply where any part of the use of the cars or boats during the tax year was within the domiciliary state, such rule would nevertheless apply in the instant case, because no part of the route mileage of Appellant's boats and barges was in Ohio and such entry of the boats and barges into Ohio as was made was sporadic.

Thus, as was shown on page 5 of this brief, all the route mileage and barrel mileage of Appellant's boats and barges was in waters of foreign states. While .7 of 1% of the mileage, or 1.26% of the barrel mileage, was through the portion of the Ohio River *bordering on* Ohio, even this was not *within* Ohio, since the Ohio River all the way up to low water mark on the Ohio side is part of Kentucky. The boats and barges never took on, or delivered, any cargo in Ohio. They were never drydocked or given major repairs in an Ohio port, but always at St. Louis, Paducah, or some other downriver point. The only time any of the boats and barges ever entered an Ohio port was on those sporadic occasions when a boat put in to Cincinnati, as it would to any other port, for food or minor repairs, and even then it was within Ohio only if it happened to be docked above low water mark, which was very unlikely because of the danger of grounding which such docking would involve.

These facts make it clear that, even if it were essential to the taxing jurisdiction of a foreign state in which cars or boats are habitually used, or to corresponding immunity from taxation by the domiciliary state, that no part of

the use of a car or boat during the tax year be within the domiciliary state, the boats and barges involved in this case would still not be taxable by the State of Ohio.

CONCLUSION.

In the light of the above, we respectfully submit that the State of Ohio had no jurisdiction to tax Appellant's boats and barges for the years involved; that Sections 5328 and 5325 of the Ohio General Code, insofar as they purport to tax such boats and barges for such years, are violative of the due process clause of the Fourteenth Amendment of the Constitution of the United States; and that, accordingly, the judgment of the Supreme Court of Ohio here appealed from should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1951.

No. 184.

THE STANDARD OIL COMPANY,
an Ohio Corporation,
Appellant,

vs.

JOHN W. PECK,
Tax Commissioner of Ohio, and
JOHN J. CARNEY,
Auditor of Cuyahoga County, Ohio,
Appellees.

APPEAL FROM
THE SUPREME COURT OF THE STATE OF OHIO.

REPLY BRIEF FOR APPELLANT.

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CASES CITED.

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N. Y. Central Railroad v. Miller, 202 U. S. 584 (1906) 2

Northwest Airlines, Inc. v. Minnesota, 322 U. S. 292 (1944) 2, 5

Reeves v. Island Creek Fuel & Transportation Co., 313 Ky. 400, 230 S. W. 2d 924 (1950) 3-4, 5

Union Transit Co. v. Kentucky, 199 U. S. 194 (1905) 3, 6, 7

Union Transit Co. v. Lynch, 177 U. S. 149 (1900) 3

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REPLY BRIEF FOR APPELLANT.

Appellee argues that, because no individual boat of Appellant, and no average number of its boats, was within any particular foreign state on each day of the tax year, Appellant's boats and barges never acquired a tax situs in any foreign state, but remained fully taxable in Ohio, the state of Appellant's domicile.

It is true that the record does not show that any individual boat, or any average number of individually changing boats, was within any particular foreign state on every day of the tax year. It does show, however, that the entire fleet of boats was used *habitually* and *solely* for the purpose of transporting crude oil from pipeline terminals on the lower Mississippi River to Appellant's river terminals on the Ohio River; that the great bulk of the

use was on three routings: Memphis, Tennessee, to Mt. Vernon, Indiana, Memphis, Tennessee, to Bromley, Kentucky, and Baton Rouge or Gibson's Landing, Louisiana, to Bromley, Kentucky; that no part of this route mileage was in Ohio; and that only 1.27% thereof was in waters which even bordered on Ohio.

The record further furnishes alternative bases for apportioning the value of the fleet of boats among the various foreign states in which collectively all its habitual use occurred. Thus, Appellant's Exhibit 2 gives the mileage, and also the barrel mileage, of each boat on each route in each tax year, and also the total mileage and barrel mileage of the entire fleet on each route in each tax year. From these figures and the standard table of Coastguard Mileages, it would be a simple matter to calculate the mileage or the barrel mileage of the fleet in each state in each of the tax years in question, and to apportion the value of the fleet among the various states on the basis of such calculation.

As stated on page 22 of our main brief, we recognize that there is language in the *Miller* and *Northwest Airlines* cases indicating that even the habitual use disclosed by this record is not sufficient either to give jurisdiction to the foreign states to tax on an apportioned basis, or to deprive the domiciliary state of the jurisdiction to tax full value. However, as shown on page 23 of our main brief, these cases are factually distinguishable from the instant case, and the right to tax cars or boats, habitually used within a foreign state for an ascertainable proportion of their use, should depend on the reality of the protection and benefits actually received from each foreign state, and not on the accident of whether one individual car or boat, or an average number of individually changing cars or boats, was present in the particular foreign state on

every day of the tax year. Furthermore, as shown on pages 24 to 26 of our main brief, in the cases of *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70 (1899), *Union Transit Co. v. Kentucky*, 199 U. S. 194 (1905) and *Johnson Oil Co. v. Oklahoma*, 290 U. S. 158 (1933), and also in the case of *Union Transit Co. v. Lynch*, 177 U. S. 149 (1900), which was not cited in our main brief, this Court sustained the right of a foreign state to levy an apportioned tax, or denied the right of a domiciliary state to levy a full tax, although the evidence of habitual use in a foreign state was certainly no stronger than in the instant case, and although there was no evidence whatever that any individual car, or any average number of changing cars were in the particular foreign state on every day of the tax year.

It may not be inappropriate to state that Kentucky, the state in which the greatest part of the use of Appellant's fleet occurred, asserts the right to levy an apportioned tax on the basis of habitual use of boats and barges in its waters, without regard to the presence of any individual boats, or an average number of boats, in the state on every day of the tax year. As set forth in Appellant's opening statement before the Ohio Board of Tax Appeals (R. 63), and as noted by the Supreme Court of Ohio in its opinion (R. 115), Kentucky in 1946 asserted a right to tax these boats for the years in question; and within the last few days, in a letter from the Special Counsel of its Department of Revenue, it has reasserted its right and policy to tax them.

That Kentucky's asserted right to tax does not depend on one individual boat, or an average number of boats, being within its borders on each day of the tax year is evidenced by the decision of the Kentucky Court of Appeals in *Reeves v. Island Creek Fuel & Transportation Co.*,

313 Ky. 400, 230 S. W. 2d 924 (1950), which was decided during the pendency of the instant case. In that case, the court held that Kentucky could assess a tax, apportioned on a mileage basis, against two boats and a fleet of barges owned by a Maine corporation, which were used to transport coal between Huntington, West Virginia, where the corporation had its principal place of business and extensive loading facilities, and Cincinnati, Ohio, where it had extensive docking and unloading installations. While the evidence showed that 94% of the route mileage was within Kentucky, and that the corporation had "mooring facilities" in Coal Haven, Kentucky, which were "used when the exigencies of navigation required," there was no showing that there were any boats in Kentucky on each day of the tax year. In rejecting the corporation's argument that the use of the boats in Kentucky gave no jurisdiction to tax, the Kentucky court stated:

> "Appellee strongly insists that these tugs and barges have not acquired a taxable situs in Kentucky in that they are only transiently present and that the essential element of permanency is lacking. It is insisted that there are no termini; no particular destination or regular port of call in Kentucky; and that the time spent by appellee's barges and tugs in transit through Kentucky waters is sporadic and irregular. In one of the briefs it is said: 'To acquire such a situs the boats and barges must be permanently situated in the non-domiciliary State and permanently means continuously throughout the year, not a fraction thereof, whether days or weeks.' True, the factors above mentioned do enter into the determination of taxable situs. The idea of permanency, with respect to personal property, seems generally to be, that for such property to acquire a taxable situs, it must have a more or less permanent location as distinguished from a transient or temporary one. However, per-

manency in the sense that it must be fixed like real property is not essential to the establishment of a taxable situs for personal property. It seems to be sufficient, when in the ordinary course of business, that property is present and being used and employed with a consistent continuity and not spasmodically and temporarily.

"Following this concept there seems to have evolved the idea of estimating, by some reasonable method of aliquot division, the situs of any particular part of a mass of property whenever the mass is being used in interstate business and it is impossible to assign a situs at large to it in entirety. Such method of determining the share of an interstate mass has been applied to a fleet of steamships, lines of railroad, and the mass of railroad cars."

It is significant that the *Reeves* decision was rendered after the *Northwest Airlines* case and the *Ott* case were decided.

Appellee also argues that the showing made by Appellant in the instant case is inadequate, because the record does not show either the actual number of individual trips taken by the boats in the tax years in question, or the exact number of days spent by each boat in each state. It is true that the record does not show these facts. After we had clearly shown the fact of habitual use of the fleet in foreign states, and the fact that none of its route mileage was in Ohio, we did not attempt to give evidence of every conceivable basis for apportioning the value of the fleet among the states in which it was habitually used. What we did was to select two bases of apportionment which seemed most applicable to boats used as these were, and which have been most frequently used by this Court in tax apportionment cases. These bases were actual miles of route, which is equivalent to track mileage in the rolling

stock cases, and barrel mileage, which is the equivalent of the car mileage basis often used in rolling stock cases. It seems to us that these bases of apportionment are clearly proper and adequate in the instant case.

Applying either of these bases of apportionment, the value of Appellant's fleet is allocable in its entirety to states other than Ohio as no part of either its route mileage or its barrel mileage was within Ohio. As pointed out on page 6 of our main brief, the only time any of the boats ever docked at an Ohio port was when a boat, after discharging its cargo at Bromley, Kentucky, occasionally stopped at Cincinnati for food, fuel or minor repairs, just as it did at other points on the river; and even on such sporadic stops, the boats were almost certainly not within the State of Ohio, because Kentucky extends all the way to low water mark on the Ohio side of the river, and, presumably, a boat would not be docked where it would be grounded.

In closing this reply brief, we wish to point out that Appellee has made no attempt to distinguish the case of *Union Transit Co. v. Kentucky*, 199 U. S. 194 (1905), which has long been regarded as the leading decision of this Court on jurisdiction to tax vehicles of surface transportation. As pointed out on pages 19 and 25 of our main brief, the *Union Transit* case is on all fours with the instant case except for the fact that it involved rolling stock rather than river boats. There was no evidence in the *Union Transit* case that there were any cars in each foreign state on each day of the tax year. All the records showed was that the fleet of cars were habitually used in various foreign states, that the use could readily be apportioned among the states on a basis equivalent to car mileage, and that on such basis only one to three percent of the use was within Kentucky, the domiciliary state. On

this showing, this Court held that 97 to 99% of the value of the fleet should be deemed to have a situs outside Kentucky and that Kentucky violated the due process clause when it attempted to tax this 97 to 99%.

In view of the decision in the *Ott* case that the rule of apportionment applies to river boats as well as to rolling stock, we submit that this Court should apply the *Union Transit* decision in the instant case, and hold that under the due process clause Ohio had no right to tax Appellant's boats and barges.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 184

THE STANDARD OIL COMPANY, AN OHIO CORPORATION,
Appellant,

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO AND JOHN J. CARNEY, AUDITOR OF CUYAHOGA COUNTY, OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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Ayer & Lord Tie Co.
202 U. S. 409, 50 L.
City of St. Louis v.
423, 20 L. ed. 192
Hays v. *The Pacific M*
15 L. ed. 254
Northwest Airlines, I
88 L. ed. 1283
Ott v. *Mississippi V*
U. S. 169, 93 L. ed.
Southern Pacific Co.
222 U. S. 63, 56 L

A

Constitution of the U

INDEX

Subject Index

	Page
jurisdiction and motion to dis-	
	1
e on appeal	1
ederal questions presented by	
	2

ble of Cases Cited

v. *Commonwealth of Kentucky*, ed. 1082	3
Wiggins Ferry Co., 11 Wall.	2
ail Steamship Co., 17 How. 596,	2
nc. v. *Minnesota*, 322 U. S. 292,	3
alley Barge Line Co., Inc., 336 585	3
v. *Commonwealth of Kentucky*, ed. 96	3

uthorities Cited

nited States, 14th Amendment	2

IN THE SUPREME COURT OF OHIO

No. 32060

THE STANDARD OIL COMPANY, AN OHIO CORPORATION,
Appellant,

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO (SUBSTITUTED FOR C. EMORY GLANDER, FORMER TAX COMMISSIONER OF OHIO), AND JOHN J. CARNEY, AUDITOR OF CUYAHOGA COUNTY (SUBSTITUTED FOR JOHN A. ZANGERLE, FORMER AUDITOR OF CUYAHOGA COUNTY),

Appellees,

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT IN SUPPORT OF JURISDICTION AND APPELLEES' MOTION TO DISMISS OR AFFIRM.

The appellees in the above entitled cause, for their statement in opposition to the statement in support of jurisdiction of the appellant, filed herein, and in support of the appellees' motion to dismiss the appeal or affirm the judgment of the Supreme Court of Ohio, respectfully state the following:

I. Statement of Issue on Appeal

The question sought to be presented in this appeal is the claim of the appellant, an Ohio corporation, that Ohio

statutes levying an *ad valorem* tax on boats and barges of the appellant used in interstate commerce are contrary to and in violation of the Due Process of Law clause of the Fourteenth Amendment of the Constitution of the United States. The appellees deny the claim of the appellant that the Due Process of Law clause of the Fourteenth Amendment of the Federal Constitution prevents Ohio from enforcing the personal property tax it has assessed and levied on all of the boats and barges owned by the appellant. The Supreme Court of Ohio, in the opinion and judgment here challenged by the appellant, determined the question so raised by the appellant adversely to it.

II. No Substantial Federal Question Presented by the Appeal

This case presents the question of whether the State of Ohio can tax on an *ad valorem* basis, boats and barges, registered from an Ohio port and owned by an Ohio corporation, whose corporate domicile and principal place of business is in Ohio, which boats and barges are used in transporting, on the inland waterway of the Mississippi and Ohio Rivers, crude oil of the corporation from ports in Louisiana and Tennessee to ports in Kentucky and Indiana. The question has been answered in the affirmative by the Supreme Court of the United States, which repeatedly has declared the rule that the domicile of the owner of vessels plying between the ports of different states is the situs for the purpose of taxation, where it does not appear that such vessels have an actual situs elsewhere.

Hays v. *The Pacific Mail Steamship Company*, 17 How., 596, 15 L. Ed., 254 (1855);

City of St. Louis v. *Wiggins Ferry Company*, 11 Wall., 423, 20 L. Ed., 192 (1871);

Ayer & Lord Tie Company v. *Commonwealth of Kentucky*, 202 U. S., 409, 421, 423, 50 L. Ed., 1082, 1087 (1906);

Southern Pacific Company v. *Commonwealth of Kentucky*, 222 U. S., 63, 68, 69, 74, 75, 56 L. Ed., 96, 98, 99, 100, 101 (1911).

The facts as set forth in the opinion of the Supreme Court of Ohio in this case, as well as in the Statement in Support of Jurisdiction, disclose that the boats and barges of the appellant were not used wholly and exclusively in a state other than Ohio. The record fails to disclose whether any of the boats or barges taxed were continuously throughout the year in another state. The record only shows that the boats and barges during the tax year were transiently within the limits of other states wherein cargoes were loaded or unloaded in ports located in such other states.

The fact that appellant, in the future, because of the decision in *Ott, etc.*, v. *Mississippi Valley Barge Line Company, etc.*, 336 U. S., 169, 93 L. Ed., 585 (1949), may be required to pay personal property taxes in some other state upon some part of its boats and barges, does not presently deprive Ohio of its right to tax such property, particularly in the light of the case of *Northwest Airlines, Inc.*, v. *Minnesota*, 322 U. S., 292, 295, 88 L. Ed., 1283, 1286 (1944), and what was said by Mr. Justice Frankfurter at page 295 (1286):

> " * * * The fact that Northwest paid personal property taxes for the year 1939 upon 'some proportion of its full value' of its airplane fleet in some other States does not abridge the power of taxation of Minnesota as the home State of the fleet in the circumstances of the present case. *The taxability of any part of this fleet by any other State than Minnesota, in view*

of the taxability of the entire fleet by that State, is not now before us. It was not shown in the Miller case (202 U. S., 584) and it is not shown here that a defined part of the domiciliary corpus has acquired a permanent location, i. e., a taxing situs, elsewhere. * * *" (Emphasis and parenthetical matter ours.)

The doctrine of tax apportionment by a nondomiciliary state applied to vessels engaged in interstate commerce and not taxed by the domiciliary state upheld by the Supreme Court of the United States in *Ott, etc.*, v. *Mississippi Valley Barge Line Company, etc.*, 336 U. S., 169, 93 L. Ed., 585 (1949), is not involved in this appeal. The fact that the principle of that case, involving vessels not taxed by the domiciliary state (page 170, *supra*), may be asserted some day by some state does not raise now a substantial federal question or preclude Ohio, as the domiciliary state and the state wherein the appellant has its principal place of business, and wherein the home port of the boats and barges is located, from taxing such boats and barges (*Northwest Airlines, Inc., v. Minnesota*, 322 U. S., 292, 88 L. Ed., 1283); especially in the absence of any showing in the present record that the boats and barges of the appellant were permanently located elsewhere, and that some other state having acquired lawful jurisdiction actually had taxed, in whole or in part, such boats and barges.

It is submitted that the claimed federal constitutional question presented in the appeal has been so definitely determined by the Supreme Court of the United States that no substantial question is presented by the appellant entitling the appellant to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, appellees respectfully move that the with
appeal be dismissed or that the judgment and decree of t
Supreme Court of Ohio be affirmed.

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No. 184.

Supreme Court of the United States

OCTOBER TERM, 1951.

THE STANDARD OIL COMPANY, AN OHIO CORPORATION,

Appellant,

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO; JOHN J. CARNEY, AUDITOR OF CUYAHOGA COUNTY, OHIO,

Appellees.

Appeal from the Supreme Court of the State of Ohio.

BRIEF FOR APPELLEES.

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INDEX.

Statement of the case 1

Summary of argument 4

Argument 5

Point 1—The boats and barges of the appellant are subject to an ad valorem tax under Ohio statutes 5

Point 2—The due process of law clause of the 14th Amendment of the Constitution of the United States does not prevent Ohio, as the domiciliary state, from levying a personal property tax on the boats and barges of the appellant, which have acquired no permanent situs elsewhere 7

A—Boats and barges of appellant acquired no permanent situs outside of Ohio, on apportioned basis or otherwise 7

B—Nortwest Airlines, Inc., v. Minnesota, 322 U. S., 292, 88 L. Ed., 1283 (1944), is applicable to case at bar and supports the tax imposed by Ohio on boats and barges of appellant 9

Conclusion 14

Table of Cases.

Ayer and Lord Tie Co. v. Commonwealth of Kentucky, 202 U. S., 409, 50 L. Ed., 1082 ..... 7, 14

Citizens National Bank v. Durr, 257 U. S., 99, 108, 66 L. Ed., 149, 153 6

Guaranty Trust Co. v. Blodgett, 287 U. S., 509, 512, 513, 77 L. Ed., 463, 465 6

Johnson Oil Refining Co. v. Oklahoma, ex rel., 290 U. S., 158, 161, 162, 78 L. Ed., 238, 241, 242 8

Northwest Airlines, Inc., v. Minnesota, 322 U. S., 292, 88 L. Ed., 585 ..... 10, 11, 12, 13, 14

Old Dominion Steamship Co. v. Virginia, 198 U. S., 299, 49 L. Ed., 1059 7

Ott et al. v. Mississippi Valley Barge Line Co. et al., 336 U. S., 169, 93 L. Ed., 585 ..... 7, 8, 9, 10, 12

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S., 18, 35 L. Ed., 613 8

St. Louis v. Wiggins Ferry Co., 11 Wallace, 423, 20 L. Ed., 192 ..... 7, 14

Union Refrigerator Transit Co. v. Kentucky, 199 U. S., 194, 206, 50 L. Ed., 150 8

Union Tank Line Co. v. Wright, 249 U. S., 275, 282, 63 L. Ed., 602, 609 8

Wisconsin et al. v. J. C. Penney Co., 311 U. S., 435, 444, 85 L. Ed., 267, 270 11

Statutes.

Ohio General Code—

Section 5325 ..... 5, 6

Section 5328 5

Section 5371 ..... 5, 6

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 184.

THE STANDARD OIL COMPANY, AN OHIO CORPORATION,

Appellant,

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO, JOHN J. CARNEY, AUDITOR OF CUYAHOGA COUNTY, OHIO,

Appellees.

BRIEF FOR APPELLEES.

I.

STATEMENT OF THE CASE.

Ohio, as the state of domicil of the appellant, levied an ad valorem personal property tax on tow boats and barges used in interstate commerce on the inland waterways of the Mississippi and the Ohio rivers by the appellant, an Ohio corporation, for the tax years 1945 and 1946.

The record discloses that the tow boats and barges of the appellant were used by the appellant on the Mississippi and Ohio rivers to carry crude oil for its own use from various points in Louisiana and Tennessee to Bromley, Kentucky, and Mount Vernon, Indiana (R., 66, 67, 68).* The crude oil unloaded at Bromley, Kentucky, was for the refinery of the appellant at Latonia, Kentucky (R., 66). The crude oil unloaded at Mount Vernon, Indiana was transshipped by pipeline to refineries of the appellant located at Lima, Toledo and Cleveland, Ohio (R., 66, 69, 76). The tow boats and barges were used interchangeably in transporting crude oil from the various points in Louisiana and Tennessee to either Bromley, Kentucky, or Mount Vernon, Indiana (R., 102B).

The record also shows that the greater bulk of the crude oil transported by the appellant on the inland waterways of the Mississippi and Ohio rivers during the calendar years 1944 and 1945 was over three routes, Memphis, Tennessee, to Mount Vernon, Indiana; Memphis, Tennessee, to Bromley, Kentucky; and Gibson Landing, Louisiana, to Bromley, Kentucky (R., 66, 69, 102B). The total river mileage on the Ohio river, bordering on the state of Ohio, traversed by the loaded crude oil barges and the tow boats of the appellant, was seventeen and one-half (17½) miles (R., 76, 84).

Bromley, Kentucky, is four (4) miles down the Ohio river from Cincinnati, Ohio (R., 76, 86), from which city the tow boats and barges were registered (R., 79). After discharging cargo at Bromley, Kentucky, the boats of the appellant would from time to time dock at Cincinnati, Ohio, for provisions, fuel or minor repairs (R., 79, 80, 86). No cargo was taken on at Cincinnati, Ohio, by the appel-

* Reference to printed transcript of record.

lant during 1944 and 1945. The boats and barges of the appellant on the trips down the Ohio and Mississippi rivers carried no cargo (R., 84).

The record does not show the actual number of trips made by each tow boat and oil barge during 1944 and 1945 either to or from the various points in Louisiana, Tennessee, Kentucky or Indiana (R., 78). The record also is silent as to how much time each tow boat or barge actually spent in the various ports in Louisiana, Tennessee, Indiana or Kentucky. There is no evidence showing the turn-around time of the tow boats and barges, or the time it took to load or unload the oil barges at the various ports. There is no evidence showing that any particular tow boat or barge was continuously throughout the year in either the waters of Louisiana, Tennessee, Kentucky or Indiana or that a portion or average number of the tow boats and barges were continuously in the waters of any of the river states (Louisiana, Tennessee, Kentucky or Indiana) during the years 1944 or 1945.

The record shows that prior to the tax years involved in this cause the appellant did not challenge or question the right of the state of Ohio to levy and collect an ad valorem tax on tangible personal property similar to that involved in this case (R., 62, 63, 64). The record does not disclose that any other state actually has taxed any of the tow boats and barges of the appellant. However, there is a statement in the record by counsel for the appellant that the state of Kentucky has asserted a right to tax the tow boats and barges of the appellant on an apportionment basis (R., 63, 65).

II.

SUMMARY OF ARGUMENT.

Point 1.

The boats and barges of the appellant are subject to an ad valorem tax under Ohio statutes.

Sections 5325, 5328 and 5371 of the General Code of Ohio.

Point 2.

The due process of law clause of the Fourteenth Amendment of the Constitution of the United States does not prevent Ohio, as the domiciliary state, from levying a personal property tax on the boats and barges of the appellant, which have acquired no permanent situs elsewhere.

St. Louis v. Wiggins Ferry Company, 11 Wallace, 423, 20 L. Ed., 192 (1871);
Ayer and Lord Tie Company v. Commonwealth of Kentucky 202 U. S., 409, 50 L. Ed., 1082 (1906);
Old Dominion Steamship Company v. Virginia, 198 U. S., 299, 49 L. Ed., 1059 (1905).

(A) Boats and barges of appellant acquired no permanent situs outside of Ohio, on apportioned basis or otherwise.

(B) Northwest Airlines, Inc., v. Minnesota, 322 U. S., 292, 88 L. Ed., 1283 (1944), is applicable to case at bar and supports the tax imposed by Ohio on boats and barges of appellant.

III.

ARGUMENT.

Point 1.

The Boats and Barges of the Appellant Are Subject to an Ad Valorem Tax Under Ohio Statutes.

The taxation of the tow boats and barges of the appellant was pursuant to the provisions of Sections 5325, 5328 and 5371 of the General Code of Ohio. Boats are included in the legislative definition of the term "personal property" as used in the Ohio taxing statutes. The term "personal property" is defined in Section 5325 of the General Code of Ohio which, in so far as pertinent, reads as follows:

> "The term 'personal property' as so used, includes * * * also every share or portion, right or interest, either legal or equitable, in and to every ship, vessel, or boat, of whatsoever name or description, used or designed to be used either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere, and whether it has been enrolled, registered or licensed at a collector's office or within a collection district in this state or not."

Section 5328 of the General Code of Ohio provides in part as follows:

> "All ships, vessels and boats and shares and interests therein, defined in this title as 'personal property' belonging to persons residing in this state, * * * shall be subject to taxation".

Section 5371 of the General Code of Ohio, relating to the listing and assessing of personal property, provides in part as follows:

> "Ships, vessels, boats and aircraft, and shares and interests therein, shall be listed and assessed in the taxing district in which the owner resides."

Under the provisions of the foregoing statutes, boats belonging to a resident of Ohio are subject to personal property tax. The taxing authority and the Supreme Court of Ohio concluded that the boats of the appellant came within the purview of the foregoing statutes, particularly Section 5325 of the General Code of Ohio, since the boats and barges of the appellant, an Ohio corporation having its corporate and actual domicile in Ohio, were used in part in navigating the waters of the Ohio river bordering on the state of Ohio and also because there was no evidence in the record showing that the boats and barges were used exclusively in any other state. The conclusion of the Supreme Court of Ohio that the cited statutes applied to the boats and barges of the appellant is binding according to the cases of **Citizen National Bank, etc., v. Durr**, 257 U. S., 99, 108, 66 L. Ed., 149, 153 (1921), and **Guaranty Trust Company v. Blodgett**, 287 U. S., 509, 512, 513, 77 L. Ed., 463, 465 (1933).

Point 2.

The Due Process of Law Clause of the Fourteenth Amendment of the Constitution of the United States Does Not Prevent Ohio, as the Domiciliary State, from Levying a Personal Property Tax on the Boats and Barges of the Appellant, Which Have Acquired No Permanent Situs Elsewhere.

The tax imposed by Ohio is challenged by the appellant solely under the due process clause of the Fourteenth Amendment of the Constitution of the United States. This court has repeatedly held that vessels are taxable by the domiciliary state, except where the vessels are operated wholly on waters within another state, in which event the latter state and not the domiciliary state has jurisdiction to tax. Moreover, the right of the domiciliary state to tax vessels does not depend on the physical presence of such vessels within the state, the jurisdiction to tax being based primarily on the domicile of the owner within the taxing state. **St. Louis v. Wiggins Ferry Company**, 11 Wallace, 423, 20 L. Ed., 192 (1871); **Ayer and Lord Tie Company v. Commonwealth of Kentucky**, 202 U. S., 409, 50 L. Ed., 1082 (1906), and **Old Dominion Steamship Company v. Virginia**, 198 U. S., 299, 49 L. Ed., 1059 (1905).

(A) Boats and Barges of Appellant Acquired No Permanent Situs Outside of Ohio, on Apportioned Basis or Otherwise.

However, the appellant relying on the decision in **Ott, etc., et al., v. Mississippi Valley Barge Line Company et al.**, 336 U. S., 169, 93 L. Ed., 585 (1949), contends that Ohio, as the domiciliary state lost its jurisdiction to tax the full value of its boats and barges, because such tangible prop-

erty had acquired on an apportioned basis a taxing situs elsewhere. The record factually does not support the contention asserted by the appellant. There is no evidence in the record which shows that the boats and barges of the appellant in whole or in part were used exclusively in any state or were permanently in any state. Likewise there is no evidence showing that any average number of the boats and barges of the appellant were continuously, that is day to day, throughout the tax year, in either Louisiana, Kentucky, Tennessee or Indiana. The record only shows that the boats and barges of the appellant intermittently entered various ports in the states along the Mississippi and Ohio rivers for the purpose of loading or unloading crude oil for the use of the appellant in the ports located therein. In short, the record is devoid of any proof that the boats or barges of the appellant acquired a permanent situs for tax purposes apart from Ohio either because the boats or barges were used exclusively in any state or because an average number of the boats and barges were continuously, day by day, throughout the year, in another state.

The case of **Ott, etc., et al., v. Mississippi Valley Barge Line Company et al.**, 336 U. S., 169, 93 L. Ed., 585 (1949), approving and applying the rule of apportionment, announced in the railroad rolling stock cases (**Pullman's Palace Car Company v. Pennsylvania**, 141 U. S., 18, 35 L. Ed., 613 (1891); **Union Refrigerator Transit Company v. Kentucky**, 199 U. S., 194, 206, 50 L. Ed., 150 (1905); **Union Tank Line Company v. Wright**, 249 U. S., 275, 282, 63 L. Ed., 602, 609 (1919), and **Johnson Oil Refining Company v. Oklahoma, ex rel.**, 290 U. S., 158, 161, 162, 78 L. Ed., 238, 241, 242 (1933)) to boats and barges belonging to a foreign corporation and used by the foreign corporation, a cer-

tificated public carrier in interstate commerce on inland waterways, did so, on the basis that an average number of such boats were continuously throughout the year in the non-domiciliary state. The court assumed for the purposes of the case that some part of the vessels were daily in the state of Louisiana and the fact that the taxing statute applied only to an average number of vessels continuously in the state. That basis of the decision is emphasized by Mr. Justice Douglas in the opinion of the court at page 175:

> "Louisiana's Attorney General states in his brief that the statute 'was intended to cover and actually covers here, an average portion of property permanently within the State—and by permanently is meant throughout the year.'"

In short, the rule of law announced in the railroad rolling stock cases and followed and applied in **Ott, etc., et al., v. The Mississippi Valley Barge Line Company et al.**, 336 U. S., 169, 93 L. Ed., 585 (1949), is not applicable to the present case because it does not affirmatively appear from the record that any specific boat or barge or any average number of boats or barges of the appellant was or were continuously in any other state during the tax year, so as to be taxable in any other state. Consequently, in the face of the record, Ohio had jurisdiction as the domiciliary state to tax the full value of the boats and barges of the appellant.

(B) NORTHWEST AIRLINES, INC., V. MINNESOTA, 322 U. S., 292, 88 L. ED., 1283 (1944), IS APPLICABLE TO CASE AT BAR AND SUPPORTS THE TAX IMPOSED BY OHIO ON BOATS AND BARGES OF APPELLANT.

In the absence of any evidence in the present record that the boats and barges of the appellant were wholly or con-

tinuously and habitually used in another state, Ohio, as the domiciliary state had jurisdiction to tax such boats and barges. In view of the record, the case of **Northwest Airlines, Inc., v. Minnesota**, 322 U. S., 292, 88 L. Ed., 1283 (1944), rather than **Ott, etc., et al., v. Mississippi Valley Barge Line Company et al.**, 336 U. S., 169, 93 L. Ed., 585 (1949), is applicable to the case at bar, since none of the boats and barges of the applicant acquired an "actual situs" in any other state during the entire tax year, by being continually in such other state. The doctrine of tax apportionment for movable instrumentalities engaged in interstate commerce is inapplicable because as stated by Mr. Justice Frankfurter in the course of his opinion in **Northwest Airlines, Inc., v. Minnesota**, 322 U. S., 292, 88 L. Ed., 1283, 1287 (1944), at page 297:

> "But the doctrine of apportionment has neither in theory nor in practice been applied to **tax units of interstate commerce visiting for fractional periods of the taxing year.**" (Emphasis ours)
>
> . . . . . .
>
> "The continuous protection by a State other than the domiciliary State—that is, **protection throughout the tax year has furnished the Constitutional basis for tax apportionment in these interstate commerce situations**, and it is on that basis that the tax laws have been framed and administered." (Emphasis ours)

The right of Ohio, as the domiciliary state—the state which created the appellant and the state wherein the appellant has its corporate domicile and principal place of business—to levy a full ad valorem personal property tax on the boats and barges of the appellant used in interstate commerce, is fully recognized in **Northwest Airlines, Inc., v. Minnesota**, 322 U. S., 292, 88 L. Ed., 1283 (1944), which was mentioned in the opinion in **Ott, etc., et al., v. Mississippi Valley Barge Line Company et al.**, 336 U. S.,

169, 175, 93 L. Ed., 585, 590 (1949), but neither expressly modified nor limited therein in any way. Paraphrasing the language of Mr. Justice Frankfurter in the **Northwest Airlines, Inc., v. Minnesota**, 322 U. S., 292, 88 L. Ed., 1283, 1285, 1286 (1944), at pages 294 and 295, brings the case at bar within the test of benefits, relation and protection announced in **Wisconsin et al. v. J. C. Penney Company**, 311 U. S., 435, 444, 85 L. Ed., 267, 270 (1940), for determining whether a state tax statute violates the due process of law clause:

> "No other State is the State which gave (Standard Oil) the power to be as well as the power to function as (Standard Oil) functions in (Ohio); no other state could impose a tax that derives from the significant legal relations of creator and creature and the practical consequences of that relation in this case. On the basis of rights which (Ohio) alone originated and (Ohio) continues to safeguard, she alone can tax the personalty which is permanently attributable to (Ohio) and no other state." (Insertion ours)

The language of Mr. Justice Frankfurter in the same opinion at pages 297 and 298 also is pertinent as to the right and power of Ohio, as the state of domicile to tax the boats and barges of the appellant:

> "The taxing power of the domiciliary State has a very different basis. It has power to tax because it is the State of domicile and no other State is. For reasons within its own sphere of choice Congress at one time chartered interstate carriers and at other times has left the chartering and all that goes with it to the States. That is a practical fact of legislative choice and a practical fact from which legal significance has always followed. That far-reaching fact was recognized, as a matter of course, by Mr. Justice Bradley in his dissent in the Pullman's Palace Car Co. case, supra (141 US at 32, 35 L ed 619, 11 S Ct 876, 3 Inters Com Rep 595). Congress of course could exert

its controlling authority over commerce by appropriate regulation and exclude a domiciliary State from authority which it otherwise would have because it is the domiciliary State. But no judicial restriction has been applied against the domiciliary State except when property (or a portion of fungible units) is permanently situated in a State other than the domiciliary State. And permanently means continuously throughout the year, not a fraction thereof, whether days or weeks."

In the same opinion, Mr. Justice Frankfurter at page 295 pointedly stated that the fact that the taxpayer had paid personal property taxes upon "some proportion of its full value" on its movable personal property used in interstate commerce in several other states, did not "abridge the power of taxation of Minnesota", as the domiciliary state and the home state of the fleet of airplanes belonging to the taxpayer. In the case at bar, there is no showing that the appellant has paid a personal property tax on its boats or barges in any other State. However, assuming for the sake of argument, that it had, nevertheless, such payment would not deny or abridge the power of taxation of Ohio, as the domiciliary state. As stated by Mr. Justice Frankfurter in **Northwest Airlines, Inc., v. Minnesota**, 322 U. S., 292, 295, 88 L. Ed., 1283, 1286 (1944), at page 295:

> "The fact that Northwest paid personal property taxes for the year 1939 upon 'some proportion of its full value' of its airplane fleet in some other State does not abridge the power of taxation of Minnesota as the home State of the fleet in the circumstances of the present case."

The doctrine of tax apportionment by a non-domiciliary state applied to vessels engaged in interstate commerce in **Ott, etc., et al., v. Mississippi Valley Barge Line Company et al.**, 336 U. S., 169, 93 L. Ed., 585 (1949), does not con-

stitute a limitation on the power of Ohio, as the domiciliary state, to tax the boats and barges of the appellant, particularly in the factual circumstances of this case, since as stated by Mr. Justice Frankfurter in **Northwest Airlines, Inc., v. Minnesota,** 322 U. S., 292, 88 L. Ed., 1283, 1288 (1944), at pages 299 and 300:

> "To introduce a new doctrine of tax apportionment as a limitation upon the hitherto established taxing power of the home State is not merely to indulge in constitutional innovation. It is to introduce practical dislocation into the established taxing systems of the States."

IV.

CONCLUSION.

The judgment appealed from should be affirmed in the factual circumstances of this case on the basis of the decisions of this court in **St. Louis v. Wiggins Ferry Company**, 11 Wallace, 423, 20 L. Ed., 192 (1871); **Ayer and Lord Tie Company v. Commonwealth of Kentucky**, 202 U. S., 409, 50 L. Ed., 1082 (1906), and **Northwest Airlines, Inc., v. Minnesota**, 322 U. S., 292, 88 L. Ed., 1283 (1944).

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